Civil Justice Committee Meeting

January 25, 2006
9:30 AM – 12:00 PM
24 House Office Building

Allan G. Bense
Speaker

Mark Mahon
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

(AMENDED 1/13/2006 4:29:17PM)

Amended(1)

Civil Justice Committee

Start Date and Time:	Wednesday, January 25, 2006 09:30 am
End Date and Time:	Wednesday, January 25, 2006 12:00 pm
Location:	24 HOB
Duration:	2.50 hrs

Consideration of the following bill(s):

HB 191 Guardianship by Bogdanoff
HB 193 Public Records Exemptions by Bogdanoff
HB 221 Paternity by Richardson
HB 391 Community Associations by Domino
HB 543 Condominiums by Goodlette

NOTICE FINALIZED on 01/13/2006 16:29 by Hay.Tracey

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 191 Guardianship
SPONSOR(S): Bogdanoff; Goodlette; Seiler
TIED BILLS: HB 193 **IDEN./SIM. BILLS:** SB 356

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Judiciary Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Guardianship is a process designed to protect and exercise the legal rights of individuals with functional limitations that prevent them from being able to make their own decisions. Individuals in need of guardianship may have medical conditions such as dementia or Alzheimer's disease, a developmental disability, chronic mental illness, or other condition that may cause functional limitations. A guardian is appointed by a court to manage some or all the legal affairs of a ward. A ward is a person who is unable to manage some or all of his or her legal affairs. This bill amends guardianship law, and related trust law, to:

- Provide that a guardian for an incompetent trust settlor may sue to modify a trust before the trust becomes irrevocable.
- Provide that a guardianship court may appoint a court monitor on an emergency basis with no notice to the guardian.
- Require that a court consider all possible alternatives to guardianship, such as use of an existing trust or existing durable power of attorney, prior to imposing a guardianship on an incapacitated person.

This bill does not appear to have a financial impact on state or local government or in the private sector.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- The bill has the potential to increase the number of cases in which a monitor is appointed and, therefore, increase the need for a greater number of individuals available to serve as monitors and increase the workload of the court.

Empower families -- This bill affects family relationships by allowing the court or other concerned parties to intervene when a guardian may be taking advantage of a ward.

B. EFFECT OF PROPOSED CHANGES:

Current law

Trusts

A trust is generally defined as:

> [A] fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.[1]

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."[2] "Trustee" refers to "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."[3]

Trust Contests

Section 737.2065, F.S., expressly prohibits the bringing of any action to contest the validity of any or all parts of a trust until the trust becomes irrevocable. This section was enacted in 1992, along with similar legislation forbidding the commencement of will contests before the death of the testator.[4]

Generally, revocable trusts are correctly treated as will substitutes, although they serve an additional function that is not contemplated by a will: a revocable trust can serve as the framework for the investment, management, expenditure, and distribution of the grantor's assets during his or her life.[5] It is because of the similarity between a will and a revocable trust that the Legislature, in 1992, enacted statutes forbidding challenges to either instrument prior to the death of the testator for a will or prior to the trust becoming irrevocable, which typically occurs upon the death of the trust's settlor.[6] However, because a trust can operate during the settlor's lifetime, and because the settlor may become

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[1] 55A Fla. Jur. 2d Trusts s.1.
[2] Section 731.201(17), F.S.
[3] *Id.* at (35).
[4] Wm. Fletcher Belcher, *Proposed Exception to Existing Prohibition Against Contesting Revocable Trusts*, Vol. XXV ActionLine No. 2, 11 (2003). ActionLine is a publication of the Florida Bar's Real Property, Probate and Trust Law Section.
[5] *Id.*
[6] *See Id.*

incapacitated, there is also a potential guardianship aspect to a trust which, again, is not present in a will. An invalid revocable trust, which administers the grantor's assets during his or her lifetime, has the potential to cause great harm to the grantor.[7] "Unlike probate, serving as a guardian is a responsibility that may change over time, last for many years, and include excruciatingly complex decisions about medical treatment, placement, and trade-offs between autonomy and beneficence."[8]

Guardianship

The Legislature has stated the general purpose of the guardianship chapter as follows:

> [I]t is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs. Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf.[9]

As noted elsewhere, the Legislature's intent in section 744.344, F.S., indicates that a "guardian should be granted no more authority over the ward and his or her property than is necessary for the guardian to address the needs created by the specific incapacities of the ward, so that the substitute decision-making of the guardian leaves the ward with as much personal autonomy as is feasible."[10]

Some of the relevant definitions of terms used in guardianship include: "ward," a person for whom a guardian has been appointed;[11] "guardian," a person who has been appointed by the court to act on behalf of a ward's person, property, or both;[12] and "court monitor," a person appointed by the court pursuant to s. 744.107, F.S., to provide the court with information concerning a ward.[13]

Determining Incapacity

Section 744.331, F.S., sets forth the procedures for determining that a person is incapacitated. The notice of filing of a petition to determine incapacity and the petition for appointment of a guardian must be read to the alleged incapacitated person, the person must be provided with an attorney, who cannot serve as the guardian or counsel for the guardian, and within five days of filing a petition for determination of incapacity, the court must appoint an examining committee which must include a psychiatrist/physician, and a psychologist, a nurse, social worker, gerontologist, or other qualified persons with sufficient knowledge, skill, experience, or training.[14] Each committee member must examine the person and then issue a joint report evaluating the person's mental health, functional ability, and physical health.[15] If the committee determines that the person is not incapacitated in any respect, the court must dismiss the petition.[16] Pursuant to s. 744.331(6), F.S., if the court finds by clear and convincing evidence that the person is incapacitated, the court must enter a written order determining the person's incapacity, although such incapacity shall extend only to the rights specified in

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[7] Belcher, *Prohibition Against Contesting Revocable Trusts*, at 11.
[8] Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 926-27 (2002).
[9] Section 744.1012, F.S.
[10] *In re Guardianship of Fuqua*, 646 So. 2d 795, 796 (Fla. 1st DCA 1994).
[11] Section 744.102(20), F.S.
[12] *Id.* at (8).
[13] *Id.* at (5).
[14] Section 744.333(1)-(3)(a), F.S.
[15] *Id.* at (3)(b)-(c).
[16] *Id.* at (4).

the order. Section 744.331(6)(b), F.S., provides that the "court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward." Section 744.331(6)(f), F.S., provides that "[w]hen an order is entered which determines a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights."

Powers of Guardian Upon Court Approval

Section 744.441(11), F.S., provides that a plenary or limited guardian of the property may "[p]rosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in performance of his or her duties."[17] Other powers given under s. 744.441, F.S., and which a guardian may only exercise with court approval, include executing, exercising, or releasing any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised if not incapacitated, if the execution, exercise, or release would be in the best interest of the ward.[18] Additionally, a guardian may "[c]reate revocable or irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning."[19] Thus, it appears that a guardian may exercise powers over a revocable trust, which might include the power to revoke the trust.

Court-Appointed Guardianship Monitors

The "front end" of adult guardianship is the determination of incapacity and appointment of a guardian, and the "back end" is accountability of the guardian and court monitoring.[20] Court monitoring of guardianship is vital to the protection of the ward, to provide the court with a way to verify the financial accounts the guardian provides to the court.[21] Verifying information in personal-status reports requires more personal involvement by the court, and is best accomplished by someone who can visit the ward to ascertain the suitability of the ward's living arrangements, the frequency of guardian visits, and the implementation of the care plan.[22]

Court Monitors

Section 744.107, F.S., allows the court to appoint a monitor "upon inquiry from any interested person" or on its own motion. The monitor has authority to "investigate, seek information, examine documents, or interview the ward," and to present a report of such findings to the court.[23] A family member or any other person with an interest in the proceedings may not serve as a monitor.[24] A monitor may be paid a reasonable fee from the property of the ward, but no state, county, or municipal employee may be paid a fee for serving as a monitor.[25]

This section gives the trial court broad authority to appoint a monitor in guardianship cases, but the statute has been criticized for its lack of guidelines regarding how the court-appointed monitor should perform his or her duties.[26] In 2003, the Florida Supreme Court's Commission on Fairness, Committee on Court Monitoring, issued a report and recommendations finding that greater oversight of court

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[17] Section 744.411(11), F.S.
[18] *Id.* at (2).
[19] *Id.* at (19).
[20] Hurme, *Guardian Accountability*, 31 STETSON L. REV. at 867.
[21] *Id.* at 907.
[22] *Id.* at 907-08.
[23] Section 744.107, F.S.
[24] *Id.*
[25] *Id.*
[26] The Florida Bar, Real Property, Probate, and Trust Law Section, White Paper on PROPOSED AMENDMENTS TO CHAPTERS 737 & 744, F.S.

monitors was warranted and recommending an overhaul and expansion of the court monitoring statute.[27]

Effect of the Bill

Trusts

This bill amends s. 737.2065, F.S. to create an exception to the prohibition on filing an action against a trust prior to that trust becoming irrevocable. Under this bill, a challenge to the trust could only be brought by a court-appointed guardian of the person of the incompetent ward/settlor of the trust, and the court would have to make a finding that the challenge to the trust was in the ward's best interests during his or her probable lifetime. This bill creates a requirement that, if the court denied the guardian's request, the court must review whether the ward was still in need of a guardian and whether the current delegation of rights was appropriate to serve the ward's needs. Unless there is a court-appointed guardian of the property of an incapacitated settlor, there cannot be any contest challenging the trust before it becomes irrevocable because, presumably, a competent trust settlor can personally revoke or amend the trust as necessary during the settlor's lifetime.[28]

Guardianship

This bill amends s. 744.331, F.S. to require that when a court finds by clear and convincing evidence that a person is incapacitated, the court must enter a written order determining such incapacity, but that the incapacity may only extend to the rights specified in the order. When entering an order of incapacity, the court must consider and determine whether or not there is an alternative to guardianship that will sufficiently meet the needs of the incapacitated person. Unless the court finds that there is a suitable alternative that will sufficiently address the problems of the incapacitated person, a guardian must be appointed. Additionally, this bill amends s 744.331, F.S. to provide that when an interested person files a verified statement asserting a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid, and a reasonable factual basis for the belief is given, the existence of such an instrument is not considered an alternative to the appointment of a guardian. However, the appointment of a guardian does not preclude the court from determining that specific authority established by a durable power of attorney may still be exercised by the attorney in fact.

This bill amends s. 744.107, F.S. to provide for service of the order of appointment and the monitor's report upon the guardian, the ward, the respective attorneys and other persons, as determined by the court. The bill also authorizes, if necessary, further action by the court to protect the interests of the ward. If further action is warranted upon receipt of the monitor's report, the trial court must conduct a noticed hearing and then take whatever action is necessary to protect the assets of the ward's estate, including suspending a guardian or taking steps to remove a guardian.

This bill amends s. 744.441(11), F.S. to provide that before a guardian may bring an action pursuant to s. 737.2065, F.S., contesting the validity of a trust, the court must first find that the action appears to be in the ward's best interest during the ward's probable lifetime. Furthermore, if the court denies the guardian's request to bring an action under s. 737.2065, F.S., the court must review the ward's continued need for a guardian and the extent of that need, if any.

The bill creates a new section, s. 744.462, F.S., which provides a framework, after a guardian has been appointed, through which the court may respond to new developments or information which may affect the guardianship proceeding. This section authorizes the court to review the extent of the ward's continued need for a guardian or whether a guardian is needed, in the event of any new developments such as a judicial determination of the existence of a valid durable power of attorney or a valid trust amendment.

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[27] *Id.*
[28] *Id.*

Emergency Court Monitors

The bill also creates s. 744.1075, F.S., entitled "emergency court monitor," to provide that a court may, upon inquiry from any interested person or upon its own motion, appoint a court monitor on an emergency basis without notice. The limitation on this authority is that the court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.[29]

The court order must specifically name the powers and duties of the monitor and the matters to be investigated. Fifteen days after entering the order of appointment, the monitor must file a verified report of findings and recommendations to the court, along with supporting documents or evidence. After reviewing the monitor's report, the court shall determine whether there is probable cause to take further action on behalf of the ward's person or property. If there is no probable cause, the court shall issue an order so stating and discharge the monitor.

However, if probable cause exists, the court must issue a show cause order directing the guardian or other respondent to state the essential facts constituting the charge and directing the respondent to appear and show cause as to why the court should not take further action. The order shall name a time and place for a hearing and provide "a reasonable time to allow for the preparation of a defense after service of the order." The authority of an emergency monitor is limited to sixty days or until an order showing no cause is issued, whichever occurs first. However, the monitor's authority may be extended by thirty days if there is a showing that emergency conditions still exist. Prior to the hearing on the order to show cause, the court may take action to protect the ward's physical or mental health, safety, or assets, including issuing a temporary injunction, restraining order, or an order freezing assets. The court shall give a copy of such order to all parties. After the hearing on the show cause order, the court may impose sanctions on the guardian, his or her attorney, or any other respondent. The court may also take any other action authorized by law, including entering a judgment of contempt, ordering an accounting, freezing assets, referring the case for criminal charges, filing a complaint with the Department of Children and Families Services ("DCFS"), or initiating proceedings to remove a guardian.

Finally, a monitor may be paid a reasonable fee, as determined by the court, which shall be paid from the ward's property. An employee of the state, county, or municipality may not be compensated for conducting an investigation and providing such a report. If the court finds that the motion for a court monitor was filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

C. SECTION DIRECTORY:

Section 1. Amends s. 737.2065, F.S., to state that the guardian of the property for an incapacitated grantor may initiate a trust contest prior to the trust becoming irrevocable.

Section 2. Amends s. 744.107, F.S., to establish certain restrictions upon whom the court may name as a monitor, listing certain individuals who have a right to receive the monitor's report, and granting the court power to conduct a hearing should the monitor's report warrant action on behalf of the ward.

Section 3. Creates s. 744.1075, F.S., entitled "emergency court monitor," establishing guidelines whereby a court may sua sponte appoint a court monitor on an emergency basis without notice.

Section 4. Amends s. 744.331(6)(b) and (f), F.S., regarding procedures to determine incapacity, setting forth procedures for the court to follow when entering an order of incapacity, and establishing requirements for an interested person who wishes to challenge the validity of an incapacitated person's trust, trust amendment, or durable power of attorney.

[29] s. 744.1075(1), F.S.

Section 5. Amends s. 744.441(11), F.S., to require a finding by the court that an action to be commenced by the guardian appears to be in the ward's best interests, and stating that if the court denies the guardian's request, the court shall review the ward's continued need for a guardian.

Section 6. Creates s. 744.462, F.S., to require that any judicial determination concerning the validity of an instrument concerning the ward's property must be promptly recorded in the guardianship proceeding and stating that, under certain circumstances, the court shall review the ward's continued need for a guardian.

Section 7. Provides that this bill shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   According to the Office of the State Courts Administrator (OSCA), this bill may result in minimal workload and fiscal impact on the judiciary due to a potential increase in the number of guardianship issues. However, OSCA did not provide an estimate of those costs.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill recognizes that a person with functional limitations may not be able to make a reasonable decision which has lifetime implications such as creating an irrevocable trust. Accordingly, the bill creates an exception to the general rule by allowing a guardian for an incompetent trust settlor to sue to modify a trust before the trust becomes irrevocable. If such a suit is successful, persons with functional limitations will be provided more safeguards to protect the wards property. Further, by providing the courts with authorization to appoint an emergency monitors, it appears that the wards property will be provided greater protection.

D. FISCAL COMMENTS:

The bill provides that the fee for a monitor, as determined by the court, may be paid from the assets of the ward. In the case of an indigent ward with no funds to pay monitor costs, it is unclear whether that makes the ward ineligible for the services of a monitor or, if not, how the monitor will be paid.

Last year the following fiscal comments were provided regarding a substantially similar bill, HB 457: The bill has the potential to have a fiscal impact on state government. By expanding current provisions related to the appointment of court monitors and creating a new section of law related to the appointment of emergency court monitors, more court monitors could be appointed. While full-time employees of the state, county, and municipal governments are not allowed to receive compensation

for serving as court monitors, more government employee time may be spent acting as court monitors because of the expanded authority granted to courts to oversee the relationship between guardians and wards. OSCA believes there would be a fiscal impact on the court as a result of an increase in judicial workloads on guardianship issues. OSCA did not provide an estimate of those costs to committee staff.

The bill provides that court monitors may be allowed a reasonable fee as determined by the court which may be paid from the assets of the ward. While this may result in a financial consequence to the ward, that fiscal impact may be offset by a savings to the ward if his or her assets are being mismanaged by a guardian.

The Department of Elder Affairs, the Statewide Public Guardianship Office, and the Agency for Persons With Disabilities all reported that there would be no fiscal impact on the agency or office. The Department of Children and Family Services, which has responsibility for Adult Protective Services and the Abuse Hotline, declined to provide an analysis of the bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that counties and municipalities have to raise revenue.

2. Other:

The bill provides that the court may, under certain circumstances, appoint a court monitor on an emergency basis without notice, which could raise due process concerns. Minimal procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may take advantage of that right, they must be notified. Issues associated with such due process concerns were raised and discussed as the Supreme Court's Commission on Fairness, Committee on Guardianship Monitoring explored guardianship monitoring in Florida. The Committee concluded:

> Attorneys and professional guardians who appeared before the committee repeatedly expressed concern about due process issues associated with confidential communications between the court and the guardianship monitor. The committee thoroughly explored and debated the matter. While the committee is sensitive to the fact that attorneys and guardians may perceive there is a potential ex parte communication issue, the committee believes that in reality there is no impropriety as long as proper court procedures are established, published, and followed. Because the guardianship monitor is an arm of the court and works at the direction of the judge, it is permissible for communication between the court and monitor to be confidential (see, for example, rule 2.051(c)(3)(b), Florida Rules of Judicial Administration). Nevertheless, the committee recommends that insofar as possible, the monitoring process should be transparent and open, and all communications between the monitor and the judge should be in writing, becomes part of the confidential portion of the court file, and copies provided to counsel and other interested persons as prescribed by Florida law.[30]

B. RULE-MAKING AUTHORITY:

None.

[30] Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Wards. Supreme Court Commission on Fairness, Committee on Guardianship Monitoring. 2003 [hereinafter Guardianship Monitoring in Florida].

C. DRAFTING ISSUES OR OTHER COMMENTS:

Guardianship Monitoring

A guardian is essentially a surrogate decision-maker for an adult with disabilities who has been adjudicated incapacitated or for a minor without parents.[31] "When the court removes an adult's rights to order his or her own affairs, there is an accompanying duty to protect the individual."[32] While guardianship proceedings are initiated by an adversarial hearing, once incapacity has been determined, there are typically no "adversaries" to raise issues before the court. Hence, the courts must be proactive to detect and respond to disputes. Guardianship monitoring is a mechanism Florida courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected.[33]

In 1999, former Chief Justice Major B. Harding directed the Supreme Court Commission on Fairness to investigate and report on various models for guardianship monitoring.[34] The Commission established the Guardianship Monitoring Committee ("Committee") with a membership that included probate judges, chief judges, court staff, representatives of the Statewide Public Guardianship Office, attorneys with experience in guardianship matters, academics, and professionals in the field of social work, all with considerable direct experience. The Committee reviewed available literature on the subject, visited Florida courts that are experimenting with innovative guardianship monitoring methods, and conducted public hearings around the state to receive input from guardians, clerks of court, attorneys, advocates, and other interested persons. The Committee found that while most guardians and attorneys do an admirable job, more active oversight is necessary in guardianship cases.[35]

As a result of its work, the Committee adopted a number of findings, including the following:

- An ideal guardianship monitoring program encompasses four major service areas: (1) initial and on going screening and reviewing of guardians; (2) reporting on the well-being of the ward; (3) reporting on the protection of the ward's assets; and (4) case administration.
- Minimum requirements for guardianship monitoring should be established and the monitoring process should be well defined.
- Insofar as possible, the monitoring process should be transparent and open, and communication between the monitor and the judge should be in writing and become part of the official court record.
- It is sound public policy for guardianship monitoring to be available in every judicial circuit.
- Monitoring will require additional resources in order to adequately oversee guardianship cases. The cost of monitoring can be mitigated through the effective use of technology.
- Existing guardianship monitoring programs that utilize well-trained and experienced professional staff are working well.

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[31] Guardianship Monitoring in Florida provides a more thorough definition. It provides that a guardian is a "surrogate decision-maker appointed by the court to make personal and/or financial decisions either (1) for an adult with mental or physical disabilities who has been adjudicated incapacitated; or (2) for a minor in circumstances where the parents die or become incapacitated or if a child receives an inheritance, proceeds of a lawsuit, or insurance policy exceeding the amount allowed by state statute." Guardianship Monitoring in Florida, *supra* at 3

[32] *Id.*

[33] Guardianship Monitoring in Florida, *supra* at 5.

[34] *Id.*

[35] Guardianship Monitoring in Florida; *supra* at 6.

- Monitoring programs that rely entirely upon volunteers are not always efficient and effective. Although well intentioned, volunteers often lack knowledge and experience with the complex medical, legal, and financial issues involved in adult guardianship cases.

- There is a need to recruit highly qualified, motivated, and trained professionals into the guardianship field; both as guardians and attorneys.[36]

The bill expands the provisions for the appointment of court monitors without incorporating provisions reflective of the findings of the Committee.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

[36] Guardianship Monitoring in Florida, *supra* at 4.

A bill to be entitled

An act relating to guardianship; amending s. 737.2065, F.S.; excepting the contesting of trust validity by property guardians of incapacitated grantors from a prohibition against commencing certain actions; amending s. 744.107, F.S.; revising provisions relating to court monitors; requiring orders of appointment and monitors' reports to be served upon certain persons; authorizing the court to determine which persons may inspect certain orders or reports; authorizing the court to enter any order necessary to protect a ward or ward's estate; requiring notice and hearing; authorizing a court to assess certain costs and attorney's fees under certain circumstances; creating s. 744.1075, F.S.; authorizing a court to appoint a court monitor on an emergency basis under certain circumstances; requiring the court to make certain findings; specifying a time period for a monitor's authority; providing for extending such time period; requiring the monitor to report findings and recommendations; providing duties of the court relating to probable cause for the emergency appointment; authorizing the court to determine which persons may inspect certain orders or reports; providing requirements for a court order to show cause for the emergency appointment; authorizing the court to issue certain injunctions or orders for certain purposes; requiring the court to provide copies of such injunctions or orders to all parties; authorizing the court to impose sanctions or take

certain enforcement actions; providing for payment of reasonable fees to the monitor; prohibiting certain persons from receiving certain fees; authorizing a court to assess certain costs and attorney's fees under certain circumstances; amending s. 744.331, F.S.; requiring a court to determine whether acceptable alternatives to guardianship of incapacitated persons exist under certain circumstances; requiring appointment of a guardian if no alternative exists; prohibiting such appointment if an alternative exists; specifying circumstances of nonexistence of an alternative; preserving certain court authority to determine exercise of certain powers of attorney; amending s. 744.441, F.S.; requiring a court to make certain findings in a ward's best interest before authorizing a guardian to bring certain actions; requiring a court to review certain continuing needs for guardians and delegation of a ward's rights; creating s. 744.462, F.S.; requiring guardians to immediately report certain judicial determinations in certain guardianship proceedings; requiring a court to review certain continuing needs for guardians and delegation of a ward's rights under certain circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 737.2065, Florida Statutes, is amended to read:

737.2065 Trust contests.--An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable, except this section shall not prohibit such action by the guardian of the property of an incapacitated grantor.

Section 2. Section 744.107, Florida Statutes, is amended to read:

744.107 Court monitors.--

(1) The court may, upon inquiry from any interested person or upon its own motion in any proceeding over which it has jurisdiction, appoint a monitor. The court shall not appoint as a monitor a family member or any person with a personal interest in the proceedings. The order of appointment shall be served upon the guardian, the ward, and such other persons as the court may determine.

(2) The monitor may investigate, seek information, examine documents, or interview the ward and shall report to the court his or her findings. The report shall be verified and shall be served on the guardian, the ward, and such other persons as the court may determine. ~~The court shall not appoint as a monitor a family member or any person with a personal interest in the proceedings.~~

(3) If it appears from the monitor's report that further action by the court to protect the interests of the ward is necessary, the court shall, after a hearing with notice, enter any order necessary to protect the ward or the ward's estate, including amending the plan, requiring an accounting, ordering production of assets, freezing assets, suspending a guardian, or

initiating proceedings to remove a guardian.

(4) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds the motion for court monitor to have been filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

Section 3. Section 744.1075, Florida Statutes, is created to read:

744.1075 Emergency court monitor.--

(1)(a) A court, upon inquiry from any interested person or upon its own motion, in any proceeding over which the court has jurisdiction, may appoint a court monitor on an emergency basis without notice. The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The scope of the matters to be investigated and the powers and duties of the monitor must be specifically enumerated by court order.

(b) The authority of a monitor appointed under this section expires 60 days after the date of appointment or upon a finding of no probable cause, whichever occurs first. The authority of the monitor may be extended for an additional 30 days upon a showing that the emergency conditions still exist.

(2) Within 15 days after the entry of the order of

appointment, the monitor shall file his or her report of findings and recommendations to the court. The report shall be verified and may be supported by documents or other evidence.

(3) Upon review of the report, the court shall determine whether there is probable cause to take further action to protect the person or property of the ward. If the court finds no probable cause, the court shall issue an order finding no probable cause and discharging the monitor.

(4)(a) If the court finds probable cause, the court shall issue an order to show cause directed to the guardian or other respondent stating the essential facts constituting the conduct charged and requiring the respondent to appear before the court to show cause why the court should not take further action. The order shall specify the time and place of the hearing with a reasonable time to allow for the preparation of a defense after service of the order.

(b) At any time prior to the hearing on the order to show cause, the court may issue a temporary injunction, a restraining order, or an order freezing assets, may suspend the guardian or appoint a guardian ad litem, or may issue any other appropriate order to protect the physical or mental health or safety or property of the ward. A copy of all such orders or injunctions shall be transmitted by the court or under its direction to all parties at the time of entry of the order or injunction.

(c) Following a hearing on the order to show cause, the court may impose sanctions on the guardian or his or her attorney or other respondent or take any other action authorized by law, including entering a judgment of contempt, ordering an

accounting, freezing assets, referring the case to local law enforcement agencies or the state attorney, filing an abuse, neglect, or exploitation complaint with the Department of Children and Family Services, or initiating proceedings to remove the guardian.

(5) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds the motion for a court monitor to have been filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

Section 4. Paragraphs (b) and (f) of subsection (6) of section 744.331, Florida Statutes, are amended to read:

744.331 Procedures to determine incapacity.--

(6) ORDER DETERMINING INCAPACITY.--If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity. A person is determined to be incapacitated only with respect to those rights specified in the order.

(b) When an order is entered that determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person. A guardian must be appointed to exercise

the incapacitated person's delegable rights unless the court finds that there is an alternative. A guardian shall not be appointed if the court finds that there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person ~~In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward~~.

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief,

the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian shall not limit the court's authority to determine that certain authority granted by a durable power of attorney is to remain exercisable by the attorney in fact ~~When an order is entered which determines that a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights~~.

Section 5. Subsection (11) of section 744.441, Florida Statutes, is amended to read:

744.441 Powers of guardian upon court approval.--After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a

limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in s. 737.2065, the court shall first find that the action appears to be in the ward's best interests during the ward's probable lifetime. If the court denies a request that a guardian be authorized to bring an action described in s. 737.2065, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 6. Section 744.462, Florida Statutes, is created to read:

744.462 Determination regarding alternatives to guardianship.--Any judicial determination concerning the validity of the ward's trust, trust amendment, or durable power of attorney shall be promptly reported in the guardianship proceeding by the guardian of the property. If the instrument has been judicially determined to be valid, or if after the appointment of a guardian a petition is filed alleging that there is an alternative to guardianship that will sufficiently address the problems of the ward, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 7. This act shall take effect upon becoming a law.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 0191**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Bogdanoff offered the following:

Amendment

Remove line(s) 59-61 and insert:

the trust becomes irrevocable, except this section does not prohibit such action by the guardian of the property of an incapacitated settlor.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2 (for drafter's use only)

Bill No. **HB 0191**

2

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Bogdanoff offered the following:

Amendment

Remove line(s) 164-219 and insert:

(b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. A guardian must be appointed to exercise the incapacitated person's delegable rights unless the court finds there is an alternative. A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person ~~In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward~~.

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power

of attorney is invalid; and

2. A reasonable factual basis for that belief,

the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the attorney in fact ~~When an order is entered which determines that a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights~~.

Section 5. Subsection (11) of section 744.441, Florida Statutes, is amended to read:

744.441 Powers of guardian upon court approval.--After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in s. 737.2065, the court shall first find that the action appears to be in the ward's best interests during the ward's probable lifetime. If the court denies a request that a guardian be authorized to bring an action described in s. 737.2065, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 6. Section 744.462, Florida Statutes, is created to read:

744.462 Determination regarding alternatives to guardianship.--Any judicial determination concerning the validity of the ward's durable power of attorney, trust, or trust amendment shall be promptly reported in the guardianship proceeding by the guardian of the property. If the instrument has been judicially determined to be valid or if, after the appointment of a guardian, a petition is filed alleging that there is an alternative to guardianship which will sufficiently

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 193 Public Records Exemptions
SPONSOR(S): Bogdanoff
TIED BILLS: HB 191 **IDEN./SIM. BILLS:** SB 358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Governmental Operations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

A court monitor is a person appointed by a court in a guardianship case to oversee a guardian. A court monitor may be appointed without notice to the guardian in cases where the court does not want the guardian to be warned of the oversight. Reports filed with the court by a court monitor may contain confidential medical and financial information regarding the ward.

This bill provides that certain court orders appointing a court monitor and discharging a court monitor, and certain reports filed by an appointed court monitor, are confidential and exempt from public disclosure.

This bill requires a two-thirds vote of the members present and voting for passage. The bill requires a majority vote in committee.

This bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Reduce government -- This bill creates a new public records exemption.

B. EFFECT OF PROPOSED CHANGES:

Current Law

Section 744.107, F.S., allows the court to appoint a monitor "upon inquiry from any interested person" or upon its own motion. The monitor has authority to "investigate, seek information, examine documents, or interview the ward," and to present a report of such findings to the court.[1] A family member or any other person with an interest in the proceedings may not serve as a monitor.[2] A monitor may be paid a reasonable fee from the property of the ward, but no state, county, or municipal employee shall be paid a fee for serving as a monitor.[3] The orders appointing court monitors and the reports of court monitors are not currently exempt from disclosure.

HB 191

A court monitor is responsible for providing a court with information regarding how well a ward is functioning under the care of a guardian. HB 191 gives a court the authority to take any action necessary to protect a ward depending upon the information presented to the court by a monitor. The bill also gives authority to a court to appoint an emergency court monitor if the ward appears to be in imminent danger of physical or mental harm; the safety of the ward could be seriously impaired; or the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The bill specifies the powers, compensation, and length of service of an emergency court monitor.

HB 193

This bill makes the order of any court appointing a monitor pursuant to s. 744.107, F.S., and the required reports submitted by such monitors relating to the medical condition, financial affairs, or mental health of the ward, confidential and exempt from the requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution.[4] While these reports and orders are confidential[5], they may be subject to inspection as determined by the court or upon a showing of good cause.

In addition, this bill makes the order of any court appointing a monitor on an emergency basis, pursuant to proposed s. 744.1075, F.S. the reports submitted by such monitors relating to the medical condition, financial affairs, or mental health of the ward, and subsequent court orders finding no probable cause or orders to show cause, confidential and exempt from s. 119.07(1) F.S. and s. 24(a), Art. I of the

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[1] Section 744.107, F.S.
[2] *Id.*
[3] *Id.*
[4] There is a difference between information and records that the Legislature has designated exempt from public disclosure and those the Legislature has deemed confidential and exempt. Information and records classified exempt from public disclosure are still permitted to be disclosed under certain circumstances. *See City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than the persons or entities specifically designated in the statutory exemption. *See Attorney General Opinion 85-62*, August 1, 1985.
[5] S. 744.1076(1)(a)-(b), F.S.

Florida Constitution. These orders and reports, however, may be subject to inspection as determined by the court or upon a showing of good cause.[6]

Additionally, a court determination that no probable cause exists, pursuant to s. 744.107, F.S. or s. 744.1075, F.S. are confidential and exempt from s. 119.07(1) F.S. and s. 24(a), Art. I of the Florida Constitution. However, like the other sections these documents may be subject to inspection as determined by the court or upon a showing of good cause.[7]

C. SECTION DIRECTORY:

Section 1. Creates s. 744.1076, F.S., establishing a public records exemption for the order of any court appointing a court monitor, and any order appointing a court monitor on an emergency basis. Finally, section 1 provides that s. 744.1076, F.S. shall be repealed on October 2, 2011, unless reviewed and saved from repeal by reenactment.

Section 2. Provides a statement of public necessity that the information concerning the appointment of a court monitor and certain court monitor's report remain confidential.

Section 3. Provides that this bill shall take effect on the same date that House Bill 191 or substantially similar legislation takes effect, if such legislation is adopted in this legislative session or an extension thereof and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The public records law in general creates a significant, although unquantifiable, increase in government spending. Government employees must locate requested documents and information, and must examine every requested document or piece of information to determine if a public records exemption prohibits release of the document or information. Passage of any new public records exemption will result in a minimal negative non-recurring fiscal impact, because governments will be required to communicate the new exemption to employees responsible for complying with public records requests. Every public records exemption also represents an unknown negative recurring expense to

[6] S. 744.1076(2)(b), F.S.
[7] S. 744.1076(3), F.S

governments, as each exemption slightly increases the number and complexity of the training and management materials required to be maintained by governments, further complicates the process of complying with public records requests, and increases the chances that a government will be involved in litigation. There is no known reliable method for determining the marginal fiscal impact attributable to a single public records exemption.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that counties and municipalities have to raise revenue.

2. Other:

Article I, s. 24(c), of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public records or public meetings exemption.

Public Records Law

Article I, s. 24(a), of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of the government.

In general, "all court records are presumed open."[8] Subject to the rulemaking power of the Florida Supreme Court, as provided by art. V, s. 2, of the Florida Constitution, the public shall have access to all records of the judicial branch of government and its agencies, except as otherwise provided.[9] Various court records are presently deemed confidential by court rule, by Florida Statutes, and by prior case law of the state.[10]

The Legislature may provide for the exemption of records from the requirements of Art. I, s. 24, by passage of a general law. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is also addressed in s. 119.07(1), F.S., which guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act of 1995, s. 119.15, F.S., provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet one of the following public purposes: 1) allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2) protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety, although only the individual's identity may be exempted under this provision; or 3) protecting trade or business secrets.

B. RULE-MAKING AUTHORITY:

This bill does not grant rule-making authority to any administrative agency.

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[8] *Times Publishing Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995).
[9] *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records*, 651 So. 2d 1185, 1188 (Fla. 1995).
[10] *Id.* at 1189; Rule of Judicial Administration 2.051(c)(9).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

A bill to be entitled

An act relating to public records exemptions; creating s. 744.1076, F.S.; creating exemptions from public records requirements for certain court records relating to appointment of certain court monitors, reports of such monitors, and determinations and orders of a court relating to findings of no probable cause; providing for future legislative review and repeal; providing findings of public necessity; providing a contingent effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 744.1076, Florida Statutes, is created to read:

744.1076 Court orders appointing court monitors and emergency court monitors; reports of court monitors; findings of no probable cause; public records exemptions.--

(1)(a) The order of any court appointing a court monitor pursuant to s. 744.107 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(b) The reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward that are required pursuant to s. 744.107 are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such reports may be subject to inspection as determined by the court or upon a showing of good cause.

(c) The public records exemptions provided in this subsection expire if a court makes a finding of probable cause, except that information otherwise made confidential or exempt shall retain its confidential or exempt status.

(2)(a) The order of any court appointing a court monitor on an emergency basis pursuant to s. 744.1075 is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(b) The reports of a court monitor appointed on an emergency basis relating to the medical condition, financial affairs, or mental health of the ward that are required pursuant to s. 744.1075 are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such reports may be subject to inspection as determined by the court or upon a showing of good cause.

(c) The public records exemptions provided in this subsection expire if a court makes a finding of probable cause, except that information otherwise made confidential or exempt shall retain its confidential or exempt status.

(3) Court determinations relating to a finding of no probable cause and court orders finding no probable cause pursuant to s. 744.107 or s. 744.1075 are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution; however, such determinations and findings may be subject to inspection as determined by the court or upon a showing of good cause.

(4) This section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15 and shall stand

repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. (1) The Legislature finds that it is a public necessity that the order of any court appointing a court monitor pursuant to s. 744.107, Florida Statutes, or appointing a court monitor on an emergency basis pursuant to s. 744.1075, Florida Statutes, be made exempt from public records requirements. The Legislature finds that the release of the exempt order would produce undue harm to the ward. In many instances, a court monitor is appointed to investigate allegations that may rise to the level of physical neglect or abuse or financial exploitation. When such allegations are involved, if the order of appointment is public, the target of the investigation may be made aware of the investigation before the investigation is even underway, raising the risk of concealment of evidence, intimidation of witnesses, or retaliation against the reporter. The Legislature finds that public disclosure of the exempt order would hinder the ability of the monitor to conduct an accurate investigation if evidence has been concealed and witnesses have been intimidated.

(2) The Legislature finds that it is a public necessity that the reports of a court monitor or a court monitor appointed on an emergency basis, relating to the medical condition, financial affairs, or mental health of the ward, be made confidential and exempt from public records requirements. The Legislature finds that the release of the confidential and exempt reports would produce undue harm to the ward. Release of the confidential and exempt reports could hinder the ability of

the monitor to conduct an investigation and interview parties because many parties involved in such an investigation would be reluctant to speak to a court monitor knowing that the information provided would be public. Protecting reports relating to the medical condition, financial affairs, or mental health of a ward would provide an environment in which to discuss information in a free and open way and would allow the court monitor to develop the information needed for reporting purposes. Furthermore, information contained in the reports relating to the medical condition, financial affairs, or mental health of a ward contains sensitive, personal information that, if released, could cause harm or embarrassment to the ward or his or her family.

(3) The Legislature finds that it is a public necessity that court determinations relating to a finding of no probable cause and court orders finding no probable cause be made confidential and exempt from public records requirements. Unfounded allegations against a guardian are sometimes made by individuals for unscrupulous reasons. Release of unfounded allegations could be damaging to the reputation of a guardian and could cause undue embarrassment as well as invade the guardian's privacy. If such information were released, it could have a negative impact on the guardian and the ward of that guardian. The guardian program relies heavily on volunteers and, as such, volunteers could be reticent to serve as the guardian of a ward. The release of such information could cause undue harm to a guardian who is the subject of an allegation for which no probable cause has been found.

(4) The public's ability to scrutinize and monitor the actions of the court is not diminished by nondisclosure of the exempt court order and the confidential and exempt reports because the exemptions expire if the court has made a finding of probable cause. In addition, such information could also be made public upon a showing of good cause.

Section 3. This act shall take effect on the same date that House Bill 191 or substantially similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

HB 221

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 221 Paternity
SPONSOR(S): Richardson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 438

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Future of Florida's Families Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Paternity is the state or condition of being a father to a child. Courts enter final judgments of paternity in paternity cases and in every divorce action involving minor children. A legal finding of paternity requires the court to establish a visitation schedule and a child support obligation. Current law does not provide a means for challenging a judgment of paternity, but a general court rule applicable to all civil actions effectively prohibit a father from challenging a paternity determination later than one year after entry of the judgment.

This bill provides that a father may challenge a paternity judgment at any time until the child's 18th birthday, provided that DNA testing shows he is not the biological father, support payments are current, and the father has not established an emotional relationship with the child. If the father prevails, his future child support obligations will terminate.

This bill may have an unknown but negative recurring fiscal impact on state government revenues. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- This bill may allow a father to, years after the entry of a paternity judgment, set the judgment aside and stop paying child support. This may result in mothers and their children losing court ordered support, and force them into seeking public assistance until the actual father can be found (if he can be).

Empower families -- This bill allows a man required to pay child support as the father of a child to petition to set aside the determination of paternity upon meeting certain conditions. This may have the effect of affecting relationships between family members and may decrease family stability.

B. EFFECT OF PROPOSED CHANGES:

Establishment of Paternity

A child born during a valid marriage is presumed to be the legitimate and legal child of the husband and wife.[1] Paternity is defined as "the state or condition of being a father."[2] In order to establish paternity for children born out of wedlock, s. 742.10, F.S., sets forth the criteria. A determination of paternity must be established by clear and convincing evidence.[3] In any proceeding to establish paternity, the court may on its own motion require the child, the mother, and the alleged father to submit to scientific tests generally relied upon for establishing paternity.[4] A woman who is pregnant or who has a child, any man who has reason to believe he is the father of a child, or any child may bring a proceeding to determine the paternity of the child when the paternity has not otherwise been established.[5]

A male can acknowledge paternity by a notarized voluntary acknowledgement or a voluntary acknowledgement signed under penalty of perjury in the presence of two witnesses. These acknowledgements create a rebuttable presumption of paternity, subject to the right of rescission within 60 days of the date of signing the acknowledgement.[6] After the expiration of the 60-day period, the signed voluntary acknowledgement of paternity constitutes an establishment of paternity and is only subject to challenge in court on the basis of fraud, duress, or material mistake of fact.[7] However, the challenger to the determination of paternity shall still be responsible for his legal responsibilities, including child support, during the pendency of the challenge, except upon a finding of good cause by the court.[8]

Currently, there is no statute authorizing a male who has been determined to be the father of a child to challenge that determination and be discharged from making child support payments. In order for a man determined to be the father of a child to be relieved of his child support obligation, he must bring an action pursuant to Florida Rules of Civil Procedure 12.540[9] and 1.540. Rule 1.540(b), entitled "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.," states in pertinent part that a party may file a motion for relief:

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[1] Section 382.013(2)(a), Florida Statutes; *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1059 (Fla. 2d DCA 2004) (citations omitted).
[2] Black's Law Dictionary, 1163 (rev. 8th ed. 2004)
[3] Section 742.031, Florida Statutes; *T.J. v. Dep't of Children & Families*, 860 So. 2d 517, 518 (Fla. 4th DCA 2003).
[4] Section 742.12(1), Florida Statutes.
[5] Section 742.011, Florida Statutes.
[6] Section 742.10(1), Florida Statutes.
[7] Section 742.10(4), Florida Statutes.
[8] Id.
[9] Rule 12.540 provides that rule 1.540 "shall govern general provisions concerning relief from judgment, decrees, or orders, except that there shall be no time limit for motions based on fraudulent financial affidavits in marital or paternity cases."

> from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . *The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken.* A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court. *[empasis in italics not in original]*

Once paternity has been adjudicated, unless there is a showing of fraud upon the court, "a paternity order is res judicata on the issue of paternity, and relitigation of the paternity issues is unauthorized in connection with any subsequently-filed motion for contempt for failure to pay court-ordered child support."[10] A final judgment of dissolution of marriage that establishes a child support obligation for a former husband is a final determination of paternity, and any subsequent paternity challenge must be brought pursuant to rule 1.540.[11]

In other words, the key section of the above rule under which a petitioner may seek relief from an order of paternity is Rule 1.540(b)(3) (the fraud provision). A petition would be required to demonstrate fraud, either extrinsic or intrinsic, within the one year time limitation imposed by the rule.

Extrinsic fraud "occurs where a defendant has somehow been prevented from participating in a cause."[12][13] One may seek relief from extrinsic fraud by filing an independent action in equity attacking the final judgment.[14] Nevertheless, due to the constraints of the definition, extrinsic fraud generally is not available as an avenue for relief for a petitioner seeking relief from an adverse paternity finding.

Intrinsic fraud, on the other hand, is fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried.[15] The Florida Supreme Court has expressly found, consistent with the general rule, "that false testimony given in a proceeding is intrinsic fraud."[16] Florida Rule of Civil Procedure 1.540(b) authorizes an action for relief from a final judgment which was obtained through intrinsic fraud, among other grounds, but within a one-year time limitation.[17] Failure to act within that one year will preclude the court from hearing any additional evidence concerning paternity and will act as a procedural bar to a petitioner's relief.

In a non-marital paternity dispute, the Second District Court of Appeal has determined that a man who was informed by the mother that he was the father of her child, and who was named as the biological

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[10] *Dep't of Revenue v. Clark*, 866 So. 2d 129 (Fla. 4th DCA 2004)(quoting *Dep't of Revenue v. Gouldbourne*, 648 So. 2d 856 (Fla. 4th DCA 1995)).
[11] *D.F. v. Dep't of Revenue*, 823 So. 2d 97, 100 (Fla. 2002).
[12] *DeClaire v. Yohanon*, 453 So. 2d 375, 377 (Fla. 1984).
[13] The Florida Supreme Court, in *DeClaire*, pointed to the United States Supreme Court's definition of extrinsic fraud as authoritative. *Declaire*, 453 So.2d at 377. That definition, from *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878), provides: Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side--these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. (Citations omitted.)
[14] *DeClaire*, 453 So. 2d at 378.
[15] *DeClaire*, 453 So. 2d at 379.
[16] *Id.*
[17] *DeClaire*, 453 So. 2d at 377.

father in a final judgment of paternity, could not have the judgment of paternity vacated six years later absent a showing that the mother had committed a fraud on the court at the time of the original paternity action.[18] Any subsequent blood testing of the alleged father, mother, and child would not change the alleged father's monetary obligations to the child in the absence of proof of fraud on the court.[19] The fact that, six years later, the mother submitted an affidavit expressing her belief that the man paying child support was not the biological father, did not constitute evidence of fraud on the court.[20]

Furthermore, the Fifth District Court of Appeal on December 2, 2005, held that a trial court erred in setting aside a judgment of paternity to which father stipulated in 1991, and in reducing child support arrearages to zero, on ground that DNA test results showed zero percent probability of paternity.[21] The judgment could not be vacated under Rule 1.540(b)(3), since the motion was not timely filed within one year.[22] Additionally, the motion was premised on intrinsic fraud, it concerned allegations of perjury or misrepresentation, and the court could not properly vacate judgment under Rule 1.540(b)(5), which provides that court may relieve party from final judgment if it is no longer equitable that the judgment should have prospective application. Equity "is not available to deprive a child of parental support based on facts that could have been determined prior to entry of the stipulated judgment of paternity."[23] Therefore, the "judgment [was] entitled to res judicata effect."[24]

Finally, in an opinion released on November 30, 2005, the Fourth District Court of Appeal, was confronted with a situation in which a male and female were married when a child was born.[25] The female represented to the male that he was the biological father of the child. Three years later the couple was divorced and the male was obligated to pay child support. After the child's fifth birthday the former husband filed an action maintaining that he was not the child's biological father and DNA testing excluded him as such.[26] The former husband's petition was dismissed by the trial court and that decision was affirmed by the appellate court. The court grappled with what it termed a "fundamental choice" in a case such as the one before them "between the interests of the legal father on the one hand and the child on the other"[27] The main issue, according to the court, "affecting the child in a disestablishment suit is the psychological devastation that the child will undoubtedly experience from losing the only father he or she has ever known."[28] On the other hand the former husband "may feel victimized,"[29] however, an adult is best able to "absorb the pain of betrayal rather than inflict additional betrayal on the involved children."[30] The court concluded, "the issue of paternity misrepresentation in marital dissolution proceedings is a matter of intrinsic fraud. It is not extrinsic fraud, or a fraud upon the court, that can form the basis for relief from judgment more than a year later. Any relevant policy considerations that would compel a different result are best addressed by the legislature."[31]

Effect of Bill

This bill provides an avenue for a male, in any action where he has been required to pay child support as the father of a child, to file a petition to set aside a determination of paternity. The petition to set aside may be filed at any time, up to the child's eighteenth (18) birthday.

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[18] *State, Dep't of Revenue v. Pough*, 723 So. 2d 303, 306 (Fla. 2d DCA 1998).
[19] *Id.*
[20] *Id.*
[21] *Dep't of Revenue v. Boswell*, 30 Fla. L. Weekly D2726 (Fla. 5th DCA Dec. 2, 2005).
[22] *Id.*
[23] *Boswell*, 30 Fla. L. Weekly D2726 *2.
[24] *Id.* * 3.
[25] *Parker v. Parker*, 2005 WL 3179971 (Fla. 4th DCA Nov. 30, 2005).
[26] *Id.*
[27] *Parker*, 2005 WL 3179971, *5.
[28] *Id.*
[29] *Parker*, 2005 WL 3179971, *6.
[30] *Parker*, 2005 WL 3179971, *6 (citation omitted).
[31] *Parker*, 2005 WL 3179971, *6.

A petition to set aside a determination of paternity must be filed in the circuit court and served on the mother or other legal guardian or custodian and must include:

- An affidavit from the petitioner affirming that newly discovered evidence has come to his knowledge since the entry of judgment;
- The results of scientific testing, generally accepted within the scientific community for showing a probability of paternity, administered within 90 days prior to the filing of such a petition, indicating that the male ordered to pay child support cannot be the father of the child for whom he is required to pay support; and
- An affidavit executed by the petitioner stating that he is current on all child support payments for the child whose paternity is in question.

The trial court must grant relief on a petition that complies with the above requirements if the court finds that all of the following have been met:

- The genetic test was properly conducted;
- The male is current on all child support payments for the child;
- The male ordered to pay child support has not adopted the child;
- The child was not conceived by artificial insemination while the child's mother and the male who is ordered to pay child support were married;
- The male ordered to pay child support did not prevent the biological father of the child from asserting parental rights over the child; and
- The male ordered to pay child support with knowledge that he is not the biological father of the child has not:
    - Married the child's mother and voluntarily assumed a parental obligation and duty to pay support;
    - Acknowledged paternity of the child in a sworn statement;
    - Been named by his consent as the child's biological father on the child's birth certificate;
    - Been required to support the child because of a voluntary written promise;
    - Disregarded a written notice from any state agency or court instructing him to submit to genetic testing;
    - Signed a voluntary acknowledgement of paternity pursuant to section 742.10(4), Florida Statutes; or
    - Declared himself to be the child's biological father.

If the petitioner fails to make the showing required by this section, the court must deny the petition.

If the trial court grants relief, it must be limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. This section does not create a cause of action for the recovery of previously paid child support.

While the petition is pending, the duty to pay child support and other legal obligations for the child remain in effect and may be suspended unless good cause is shown. The court may order child

support payments to be held in the court registry until the final determination of paternity has been made.

If the genetic testing results are provided solely by the male ordered to pay child support, the court may, on its own motion, and shall, on the motion of any party, order the child's mother, the child, and the male to submit to genetic tests. This genetic testing must occur within 30 days of an order by the trial court.

Should the child's mother or the male ordered to pay child support willfully refuse to submit to genetic testing, or if either party, as custodian of the child, willfully fails to submit the child for testing, the court must issue an order granting relief on the petition against the party failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, the failure will not be considered willful.

The party requesting genetic testing shall pay any fees charged for the tests. If the child's custodian receives services from an administrative agency providing enforcement of child support orders, the agency shall pay the costs of genetic testing if it requests the test, and the agency may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

If relief is not granted on a petition filed in accordance with this section, the court must assess costs and attorney's fees against the petitioner.

C. SECTION DIRECTORY:

Section 1 creates an unnumbered section establishing grounds by which a man required to pay child support as the father of a child may petition to set aside a determination of paternity. The bill may fit within Chapter 742, Determination of Parentage, Chapter 39, Proceedings Relating to Children, or another provision of Florida Statutes.

Section provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Unknown, but it appears that this bill may have a negative recurring fiscal impact on state revenues. See Fiscal Comments.

2. Expenditures:

   Unknown, but it appears that this bill may have a negative recurring fiscal impact on state revenues. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may relieve a financial burden on men ordered to pay child support for children who are not their biological children. Additionally, this bill authorizes setting aside of paternity determinations and

stopping prospective child support payments, the cessation of these payments will undoubtedly impact the child(ren) and the mothers. Finally, a child who is legally considered to be the "child" of a male is entitled to inheritance rights that would also be eliminated should a paternity judgment be set aside.

D. FISCAL COMMENTS:

This bill may have a fiscal impact on the Department of Revenue, as the department would no longer be able to seek reimbursement for services provided to the mother from the male formerly determined to be the father. This bill may have a fiscal impact on the Department of Revenue, as the department would expend resources to locate the "new" father if there is a judicial determination on a petition to set aside a paternity that the original male who was required to pay child support payments is not "father" of the child(ren).

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Separation of Powers

This bill might raise a separation of powers issue, because it allows for a petition to set aside a determination of paternity to be brought "at any time," although the procedural rules established by the Supreme Court restrict challenges to final orders and judgments to one year from entry of the judgment or order, except in cases of fraud upon the court. This bill could raise a constitutional concern if it were considered a procedural rather than a substantive law, although it can be argued that this bill constitutes substantive law.[32]

With respect to the separation of powers issue, several Supreme Court justices and appellate court judges have urged the Legislature to address paternity issues, although the courts' concern seems to focus on the paternity of children whose mothers are married to men who are not the biological fathers of their children.[33]

In *Anderson*, the Florida Supreme Court noted that "this is another case requiring the Court to define the law regarding a child support obligation of a husband who is not the biological father of the child."[34] The supreme court upheld the trial court's determination that the father had not proven "'by a preponderance of the evidence that he had been defrauded into believing that the minor child was his.'"[35] Justice Pariente dissented, stating that:

> Cathy Anderson's unequivocal, affirmative response to Michael Anderson that the child was his constituted a misrepresentation under Florida Rule of Civil Procedure 1.540(b)(3) . . . . In light of this affirmative misrepresentation, it was

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[32] Altenbernd, Quasi-Marital Children, 26 Fla. St. U. L. Rev. at 260-61 (noting that in a due process challenge, the Supreme Court has upheld a statute's conclusive presumption of fatherhood as a substantive rule of law supported by social policy concerns) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

[33] *Anderson v. Anderson*, 845 So. 2d 870, 872-874 (2003)(Pariente, J., dissenting); *D.F.*, 823 So. 2d at 101-03 (Pariente, J., concurring); *Fla. Dep't of Revenue v. M.L.S.*, 756 So. 2d 125, 127-33 (Altenbernd, J., dissenting); *Lefler*, 722 So. 2d at 942-44 (Klein, J., specially concurring).

[34] *Anderson*, 845 So. 2d at 870.

[35] *Id.* at 871.

> error to refuse to set aside the final judgment of dissolution in this case based on his timely filed postjudgment motion.
>
> . . . a father should be able to rely on the unequivocal, affirmative representations of his wife that he is the father of her child, and should not be obligated to request DNA testing during the divorce action to disprove this presumed fact.[36]

In *D.F.*, where the supreme court held that a final judgment of dissolution of marriage establishing a child support obligation for a former husband is a final determination of paternity, subject to challenge only through rule 1.540, Justice Pariente concurred, stating:

> I write separately to urge the Legislature to address the difficult issues raised in cases such as this one. Cases involving the rights and responsibilities of biological and non-biological parents are no doubt fraught with difficult social issues that translate into complicated legal issues. The legal problems that arise are not limited to the area of child support, but also may arise in the area of probate, wrongful death, adoption, and actions to terminate parental rights.[37]

Finally, as mentioned above the Fourth District Court of Appeal, in *Parker*, stated, "the issue of paternity misrepresentation in marital dissolution proceedings is a matter of intrinsic fraud. It is not extrinsic fraud, or a fraud upon the court, that can form the basis for relief from judgment more than a year later. Any relevant policy considerations that would compel a different result are best addressed by the legislature."[38]

Due Process

The bill may infringe upon the child's due process rights by failing to provide the child with representation in a process which will significantly affect the child's legal rights and may leave him or her without a father and without financial support. A child has a constitutional due process right to retain his or her legitimacy if doing so is in the child's best interest.[39] The child has a strong interest in maintaining legitimacy and stability,[40] and the legal recognition of a biological father other than the legal father will affect the heretofore legal father's rights to the care, custody, and control of the child.[41] Because the law does not recognize "dual fathership,"[42] the entry of a judgment of paternity and, presumably, the entry of an order rescinding a determination of paternity, affects the legal rights of both the father and the child.[43]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There is no provision in the bill for considering the best interests of the child, nor is there any requirement that the court consider appointing a guardian ad litem for the child.

The bill contains no provisions or process for amending the birth certificate if relief is granted.

The bill in lines 61-63 uses the term "disregarded" without providing a specific definition for the term or incorporating a timeframe which could be utilized for to assist in defining the term.

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[36] *Id.* at 872-73.
[37] *D.F.*, 823 So. 2d at 101.
[38] *Parker*, 2005 WL 3179971, *6.
[39] *Dep't of Health & Rehab. Servs. v. Privette*, 716 So. 2d 305, 307 (Fla. 1993).
[40] *R.H.B. v. J.B.W.*, 826 So. 2d 346, 350 n.5 (Fla. 2d DCA 2002) (citation omitted).
[41] *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1060 (Fla. 2d DCA 2004).
[42] *G.F.C. v. S.G.*, 686 So. 2d 1382, 1386 (Fla. 5th DCA 1997).
[43] See Cummings, 871 So. 2d at 1060.

The bill on line 28 uses the term "cannot," yet it would appear that DNA testing is measured in terms of probability rather than such finite terms.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

A bill to be entitled

An act relating to paternity; permitting a sworn petition to set aside a determination of paternity prior to the child's 18th birthday; specifying contents of the petition; providing standards upon which relief shall be granted; providing remedies; providing that child support obligations shall not be suspended while a petition is pending; providing for genetic testing; providing for assessment of costs and attorney's fees; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) In any action in which a male is required to pay child support as the father of a child, a sworn petition to set aside a determination of paternity may be made at any time prior to the child's 18th birthday upon the grounds set forth in this section. Any such sworn petition shall be filed in the circuit court and shall be served on the mother or other legal guardian or custodian. The petition shall include:

(a) An affidavit executed by the petitioner that newly discovered evidence has come to the petitioner's knowledge since the entry of judgment.

(b) The results of scientific tests that are generally acceptable within the scientific community to show a probability of paternity, administered within 90 days prior to the filing of such petition, which results indicate that the male ordered to

pay such child support cannot be the father of the child for whom support is required. A male who suspects he is not the father but does not have access to the child to have genetic testing performed may file a petition requesting the court to order the child to be tested.

(c) An affidavit executed by the petitioner stating that the petitioner is current on all child support payments for the child for whom relief is sought.

(2) The court shall grant relief on a petition filed in accordance with subsection (1) upon a finding by the court of all of the following:

(a) The genetic test required in paragraph (1)(b) was properly conducted.

(b) The male ordered to pay child support is current on all child support payments.

(c) The male ordered to pay child support has not adopted the child.

(d) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock.

(e) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child.

(f) The male ordered to pay child support with knowledge that he is not the biological father of the child has not:

1. Married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support;

2. Acknowledged his paternity of the child in a sworn statement;

3. Been named as the child's biological father on the child's birth certificate with his consent;

4. Been required to support the child because of a voluntary written promise;

5. Received written notice from any state agency or any court directing him to submit to genetic testing which he disregarded;

6. Signed a voluntary acknowledgment of paternity as provided in s. 742.10(4), Florida Statutes; or

7. Proclaimed himself to be the child's biological father.

(3) In the event the petitioner fails to make the requisite showing required by this section, the court shall deny the petition.

(4) In the event relief is granted pursuant to this section, relief shall be limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. The male's previous status as father continues to be in existence until the order granting relief is rendered. All previous lawful actions taken based on reliance on that status are confirmed. This section shall not be construed to create a cause of action to recover child support that was previously paid.

(5) The duty to pay child support and other legal obligations for the child shall not be suspended while the petition is pending except for good cause shown. However, the

court may order the child support to be held in the registry of the court until final determination of paternity has been made.

(6)(a) In an action brought pursuant to this section, if the genetic test results submitted in accordance with paragraph (1)(b) are provided solely by the male ordered to pay child support, the court on its own motion may, and on the petition of any party shall, order the child's mother, the child, and the male ordered to pay child support to submit to genetic tests. The court shall provide that such genetic testing be done no more than 30 days after the court issues its order.

(b) If the mother of the child or the male ordered to pay child support willfully fails to submit to genetic testing or if either such party is the custodian of the child and willfully fails to submit the child for testing, the court shall issue an order determining the relief on the petition against the party so failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, such failure shall not be considered willful.

(c) The party requesting genetic testing shall pay any fees charged for the tests. If the custodian of the child is receiving services from an administrative agency in its role as an agency providing enforcement of child support orders, that agency shall pay the cost of genetic testing if it requests the test and may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

(7) If relief on a petition filed in accordance with this section is not granted, the court shall assess the costs of the action and attorney's fees against the petitioner.

Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 221**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Richardson offered the following:

Amendment

On line 34 and on lines 41 and 42, remove:

"current on all"

and insert: "paying"

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 391 Community Associations
SPONSOR(S): Domino
TIED BILLS: None. **IDEN./SIM. BILLS:** None.

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) Judiciary Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located. A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property. A declaration of condominium may be amended as provided in the declaration.

This bill provides that any provision in the declaration of condominium, articles or incorporation, or bylaws that requires the consent or joinder of mortgagees of condominium property in order to amend the declaration, articles of incorporation, or bylaws is void. To the extent that this bill cannot make such provisions void, this bill provides notice procedures for consent or joinder by a mortgage holder. Mortgagees must provide contact information to associations, which the associations must keep records of so that the mortgagee can be contacted to consent to an amendment.

This bill revises the inspection and copying of records provisions for homeowners' associations by providing for certain circumstances where the association is not required to provide certain information. This bill also provides that an association is not liable for errors in such information when providing requested information in good faith.

This bill revises the financial reporting requirements of a homeowners' association by increasing from 60 to 90 the number of days after the end of the year that a financial report must be completed.

This bill revises the dispute resolution provisions for resolving disputes between associations and a parcel owner by removing the regulation of dispute resolution for associations from the jurisdiction of the Department of Business and Professional Regulation. This bill also provides for particular issues that are not to be resolved through presuit mediation. This bill provides procedures for sending offers to participate in presuit mediation and provides a form that is required to be used or at a minimum substantially followed. This bill provides that mediators or arbitrators must be certified as a circuit court mediator or arbitrator as established by the Florida Supreme Court.

This bill appears to have a minimal positive fiscal impact on state revenues. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill eliminates the current requirement that certain disputes between homeowners and homeowners associations be referred to the Department of Business and Professional Regulation for assignment of a mediator.

Safeguard Individual Liberty -- This bill decreases restrictions on condominium associations when amending declarations of condominium, articles of incorporation, or bylaws.

B. EFFECT OF PROPOSED CHANGES:

Background

A condominium is a "form of ownership of real property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements".[1] A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.[2] A declaration is like a constitution in that it:

> strictly governs the relationships among condominium units owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[3]

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[4] A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of two-thirds of the units.[5]

Homeowners' association means a Florida corporation responsible for the operation of a community or a mobile home subdivision in which voting membership is made up of parcel ownership and in which membership is mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.[6]

Effect of Bill

Covenant Revitalization

This bill creates s. 712.11, F.S., to provide that a homeowner's association that is not subject to chapter 720 may use the procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of chapter 712, F.S.

Mortgagee Consent or Joinder of Amendments to Declaration of Condominium

Section 718.110(11), F.S., provides that any declaration of condominium recorded after April 1, 1992, may not require the consent or joinder of mortgagees in order for an association to pass an amendment

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[1] Section 718.103(11), F.S.
[2] Section 718.104(2), F.S.
[3] *Neuman v. Grand View at Emerald Hills*, 861 So.2d 494, 496-497 (Fla. 4th DCA 2003)
[4] Section 718.104(5), F.S.
[5] Section 718.110(1)(a), F.S.
[6] Section 720.301(9), F.S.

to the declaration. This is limited to amendments which materially affect the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. Current law provides that such consent may not be unreasonably withheld. In the event mortgagee consent is provided other than by properly recorded joinder, such consent must be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded.[7]

This bill amends s. 718.110(11), F.S., to provide that any provision in the declaration of condominium, articles of incorporation, or bylaws that requires the association to obtain consent or joinder of mortgagees to amend the declaration of condominium, articles of incorporation, or bylaws are void. This provision is not limited to amendments materially affecting the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. This bill also provides that consent or joinder are not to be unreasonably withheld, and that it is presumed that amendments to the declaration of condominium, articles of incorporation, or bylaws do not materially affect the rights or interests of mortgagees.

This bill provides findings by the Legislature that consent or joinder to amendments that do not materially affect the rights or interests of mortgagees is unreasonable and is a substantial burden on the condominium owners and association. This bill also provides that there is a compelling state interest in enabling condominium association members to approve amendments.

This bill provides that any holder of a mortgage on any portion of a condominium, which is recorded after October 1, 2006, and where the declaration of condominium, articles of incorporation, or bylaws require consent or joinder of a mortgagee to pass an amendment, must provide written notice by certified mail to the association of the address where the mortgagee may be contacted in regard to any proposed amendments.

The association must keep the names and addresses of the mortgagees, which the association must use when sending a request for such consent or joinder. A request for consent or joinder must be mailed to a mortgagee by certified mail to the address provided by the mortgagee. For a mortgage recorded after October 1, 2006, consent to an amendment is deemed to have been given by a holder of a mortgage who fails to provide the required written notice and consent information. In addition, any mortgagee who fails to respond by certified mail within 30 days after the date the association mails a request for consent or joinder is deemed to have consented to the proposed amendment.

For mortgages in existence prior to October 1, 2006, and where consent or joinder is required for amendments, and where mortgagees are not required to provide notice to the association of their contact information in order to be eligible to receive notices regarding proposed amendments, associations can modify provisions in the declaration of condominium, articles of incorporation, or bylaws. The Association must notify all mortgagees who have mortgages on any part of the condominium and mortgagees must provide the same contact information as for mortgages that are recorded after October 1, 2006. Any mortgagee who does not provide contact information as required will be deemed to have consented to all future proposed amendments. In addition, failure of any mortgagee to respond to a request for the consent or joinder to a proposed amendment within 30 days after the date that a request is sent to the mortgagee by certified mail shall be deemed to have consented to the amendment.

This bill provides that in order to properly notify holders of existing mortgages the condominium association conducts a diligent search to identify all existing mortgagees and an address for the required notice to be sent to each mortgagee. Service of the notice must be on the mortgagee's registered agent. Where there is no registered agent, the notice shall be sent to the address in the original recorded mortgage unless there is a different address in a more recently recorded assignment or in the records maintained by the condominium association. All notices are sent by certified mail and if the mortgagee fails to provide the contact information requested within 30 days after the date of

[7] Section 718.110(11), F.S.

mailing of the letter from the association, then the mortgagee is deemed to have consented to the proposed amendment. A representative of the condominium association must execute an affidavit confirming that a diligent search was conducted to identify all outstanding mortgages on the condominium. The affidavit must summarize the steps that were taken in connection with the search and the notification of all mortgagees. The affidavit must be placed in the associations minute book as an attachment to the minutes of the meeting in which the board of directors considers the affidavit.

After October 1, 2006, no new declaration of condominium, articles of incorporation, or bylaws may require the consent or joinder of more than 51 percent of the eligible mortgagees in connection with any proposed amendment unless a higher percentage is required by the FNMA or FHLMC. New declaration of condominium, articles of incorporation, or bylaws must also require mortgagees to provide to the condominium association the address to which notices may be sent, in order for the mortgagees to have the right to be contacted in connection with any proposed amendments.

This bill provides that a provision requiring consent or joinder of holders of mortgages is enforceable only by mortgagees of record as of the date an amendment is recorded and only by mortgagees who have complied with providing the notice and contact information as required above. Any amendment adopted without the required consent of a mortgagee is deemed voidable by any mortgagee who was entitled to notice and the opportunity to consent.

This bill also provides that in order to establish that a mortgagee is not unreasonably withholding consent, he or she must include in his or her reply to the condominium association's request for consent or joinder a statement of the specific reasons the proposed amendment is claimed to materially and adversely affect the rights and interests of such mortgagee.

In connection with any litigation between a condominium association and a lender with regard to whether consent has been unreasonably withheld, the prevailing party is entitled to recover his or her costs and reasonable attorney's fees.

Homeowners' Associations

Current law regulates homeowner associations in chapter 720, F.S., and s. 720.302, F.S., provides that this chapter does not apply to condominium associations. This bill amends s. 720.302, F.S., to provide an exception to the current law providing that chapter 720, which regulates homeowners' associations, does not apply to condominium associations.

This bill provides that chapter 720 does not apply to any association regulated under chapters 718 (condominiums), 719 (cooperatives), 721 (timeshares), or 723 (mobile home parks), except to the extent that a provision of chapter 718, 719, or 721 is expressly incorporated into chapter 720 for the purpose of regulating homeowners' associations.

This bill also provides that not for profit corporations that operated residential homeowners' associations in Florida are to be governed by and subject to chapter 607, if the association was incorporated under the provisions of that chapter, or to chapter 617, if the association was incorporated under the provisions of that chapter.

Homeowners' Association Board Meetings

Section 720.303(2), F.S., specifies procedures for association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for those meetings between the board and its attorney relating to proposed or pending litigation. Members also have the right to attend all board meetings and speak on any matter on the agenda for at least 3 minutes.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to a meeting, except in an emergency. If notice of the board meeting is not posted in a

conspicuous place, then notice of the board meeting must be mailed or delivered to each association member at least 7 days prior to the meeting, except in an emergency. For associations that have more than 100 members, the bylaws may provide for a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision of a schedule of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[8]

A board may not levy assessments at a meeting unless the notice of the meeting includes the nature of those assessments and a statement that the assessments will be considered at the meeting.[9]

Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. This also applies to meetings of any committee or similar body when a final decision will be made regarding the spending of association funds. Proxy voting or secret ballots are also not allowed when a final decision will be made on approving or disapproving architectural decisions with respect to a specific parcel of residential property owned by a member of the community.[10]

This bill amends s. 720.303(2), F.S., as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida,[11] as follows:

This bill amends s. 720.303(2)(a), F.S., to provide that provisions of this subsection also apply to the meetings of any committee or other similar body when a final decision is made regarding the spending of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

This bill amends s. 720.303(2)(c)2., F.S., by changing the word "assessment" to "special assessment". Current law provides that, "an assessment may not be levied at a board meeting unless the notice of the meeting includes a statement that assessments will be considered and the nature of the assessments". This bill repeats this sentence with the only change being to use the term "special assessment" instead of "assessment".

This bill amends s. 720.303(2)(c)3., F.S., to remove the provision, "this subsection also applies to meetings of any committee or other similar body, when a final decision will be made regarding the expenditure of association funds, and to any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community." Therefore, the general rule that Directors may note vote by proxy or by secret ballot does not apply to committee meetings or other similar body when a final decision will be made regarding the spending of association funds. The rule will also not apply to any body with the power to approve or disapprove architectural decisions.

This bill also repeals s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, to remove conflicting versions of this subsection.

Homeowners' Association Inspection and Copying of Records

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[8] Section 720.303(2)(c)1, F.S.
[9] Section 720.303(2)(c)2, F.S.
[10] Section 720.303(2)(c)3, F.S.
[11] In 2004 the Legislature passed SB 1184, which amended s. 720.303(2),F.S., in section 2 and section 18 of the bill. In 2004, the Legislature passed SB 2984, which also amended s. 720.303(2), F.S., in section 15 of the bill. This bill is amending s. 720.303(2), F.S., as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, and is repealing s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida.

Section 720.303(5), F.S., requires that a homeowners' association allow its members to inspect and copy its official records within 10 days of a written request for access. A failure to comply with such a request in a timely fashion creates a rebuttable presumption that the association failed to do so, and entitles the requesting party to actual damages, or to a minimum of $50 per calendar day, commencing on the eleventh business day. A homeowners' association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not impose a requirement that a parcel owner demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the associations copy machine. If the association does not have a copy machine available where the records are kept, or if the records requested to be copied exceed 25 pages, then the association may have copies made by an outside vendor and may charge the actual cost of copying.

Current law expressly exempts the following from inspection by a member or parcel owner: any record protected by attorney-client or work-product privilege; information obtained in association with the lease, sale or transfer of a parcel that is otherwise privileged by state or federal law; disciplinary, health, insurance and personnel records of the association's employees; or medical records of parcel owners or other community residents.[12]

This bill amends s. 720.303(5), F.S., providing that the association or its agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association unless required by this chapter to be made available or disclosed. This bill also provides that the association or agent may charge a reasonable fee to the prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information, except for information required by law. The fee cannot exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

This bill provides that an association and its agent are not liable for providing information in good faith if the person providing the information includes a written statement in the following form: "The responses herein are made in good faith and to the best of my ability a to their accuracy."

Homeowners' Association Financial Reporting

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

This bill amends s. 720.303(7), F.S., increasing, from 60 to 90, the number of days an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year the association must provide each member with a copy of the annual financial report.

Meetings of Association Members; Amendments

Section 720.306(1)(c), F.S., provides that an amendment may not materially and adversely alter the proportionate voting interest attached to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association, unless all owners and lienholders join in the execution of the amendment. A change in quorum requirements is not an alteration of voting interests.

Section 720.306(6), F.S., provides that members and parcel owners have the right to attend all membership meetings and to speak at any meeting. A member and a parcel owner have the right to

[12] Section 720.303(1), (2), (3), (4), F.S.

speak for at least 3 minutes on any agenda item, if the member or parcel owner submits a written request to speak prior to the meeting.

This bill amends s. 720.306(1)(c), F.S., adding the provision that the merger or consolidation of associations under ch. 607, F.S. (regulating corporations) or ch. 617, F.S. (regulating non-profit corporations), is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

This bill also amends s. 720.306(6), F.S., removing the phrase "opened for discussion". This change provides that members and parcel owners have the right to speak at any meeting with reference to all items on the agenda and not to all items opened for discussion or on the agenda. A member also has the right to speak for at least 3 minutes on any agenda item.

Dispute Resolution

The Legislature recognized the role of alternative dispute resolution in reducing court dockets and trials and offering a more efficient, cost effective alternative to litigation. Section 720.311, F.S., established dispute resolution procedures for homeowners' associations and their members. Current law requires that recall disputes must be resolved by binding arbitration conducted by the Department of Business and Professional Regulation (department). Any recall dispute filed with the department must be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors, and dispute resolution procedures for condominiums. Section 718.1255, F.S., requires that arbitration proceedings relating to the recall of a condominium director must be conducted pursuant to the arbitration procedures in s. 718.1255, F.S., and provides that, if the condominium association fails to comply with the final order of arbitration, the department may take action pursuant to s. 718.501, F.S. Section 718.501, F.S., establishes the powers and duties of the department, which include the power to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties.

Section 720.311(1), F.S., provides that the department must conduct mandatory binding arbitration of election disputes in accordance with s. 718.1255, F.S. Election and recall disputes are not eligible for mediation. Current law requires a $200 filing fee, and authorizes the department to assess the parties an additional fee in an amount adequate to cover the department's costs and expenses. The fee paid to the department must be a recoverable cost in the arbitration proceeding and the prevailing party must be paid its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. Section 720.311(1), F.S., provides that any petition for mediation or arbitration shall toll the applicable statute of limitations. The statute authorizes the department to adopt rules to implement this section.

Section 720.311(2)(a), F.S., provides that the following disputes must be filed with the department for mandatory mediation by the division before the dispute is filed in court:

- Disputes between an association and a parcel owner regarding use of, or changes to, the parcel or the common areas and other covenant enforcement disputes;
- Disputes regarding amendments to the association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings not including election meetings; and
- Disputes regarding access to the official records of the association.

The mediation would be conducted under the applicable Florida Rules of Civil Procedure, and the proceeding would be privileged and confidential to the same extent as court-ordered mediation. Current law provides that persons not a party to the suit may not attend the mediation conference without the consent of all the parties. Current law also requires a $200 fee to defray the costs of the mandatory mediation, authorizes the department to charge additional fees to cover the costs of the mandatory mediation, and requires that the parties share the costs of mediation equally, unless the

parties agree otherwise. If the mandatory mediation is not successful, the department may file the dispute in a court or enter the dispute into binding or non-binding arbitration to be conducted by the department or private arbitrator. Section 720.311(2)(d), F.S, provides that the mediation procedure may be used by non-mandatory homeowners' associations.

Section 720.311(2)(c), F.S., provides standards to division certification and training of mediators and arbitrators, and division certified mediators must also be certified by the Florida Supreme Court. Section 720.311(3), F.S., requires that the division develop an education program to assist homeowners' associations and their members and officers regarding the operation of homeowners' associations under chapter 720, F.S.

Section 720.311(d) provides that the department must develop an education program to assist homeowners, associations, board members, and managers in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Current law also provides that the certification program for arbitrators and mediators and the education program for homeowners' associations and their members would be funded by moneys and filing fees generated by the arbitration and mediation proceedings.

This bill amends s. 720.311, F.S., to provide:

- That all references to mediation be changed to "presuit" mediation;
- That disputes subject to presuit mediation do not include the collection of any assessments, fine, or other financial obligation, including attorney's fees and costs, or any action to enforce a prior mediation settlement;
- That the presuit mediation requirements of s. 720.311, F.S., do not apply to any dispute where emergency relief is required;
- A form for the written offer to participate in presuit mediation that must be substantially followed by the aggrieved party and which is served on the responding party. The form is titled "Statutory Offer To Participate In Presuit Mediation" and is a boilerplate form that a party must use or substantially follow when making an offer to participate in presuit mediation. The form provides that the party may waive presuit mediation so that this matter may proceed directly to court;
- That service of the statutory offer is effected by sending the statutory form, or a letter that conforms substantially to the statutory form, by certified mail, with an additional copy being sent regular first-class mail, to the address of the responding party as it appears on the books and records of the association;
- That dispute resolution to resolve disputes between associations and a parcel owner is no longer within the jurisdiction of the Department of Business and Professional Regulation. This bill removes all provisions that reference the department found in s. 720.311, F.S.;
- That the responding party will have 20 days from the date the offer is mailed to serve a response in writing. The response is to be served by certified mail, with an additional copy being sent by regular first-class mail to the address shown on the offer;
- That the mediator may require advance payment of fees and costs. This bill removes the $200 filing fee requirement, and other language providing for the fees for a department mediator.
- That failure of either party to appear for mediation, respond to the offer, agree on a mediator, or pay the fees and costs will entitle the other party to seek an award of the costs and fees associated with mediation;
- That if presuit mediation cannot be conducted within 90 days after the offer to participate then an impasse will be deemed unless both parties agree to extend the deadline;
- That any issue or dispute that is not resolved at presuit mediation, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process.

Proposed Revived Declaration

Section 720.405(4), F.S., provides that the proposed revived declaration and other governing documents for the community shall:

- Provide that the voting interest of each parcel owner is the same as the voting interest of the parcel owner under the previous governing documents;
- Provide that the proportional-assessment obligations of each parcel owner is the same as proportional-assessment obligations of the parcel owner under the previous governing documents;
- Contain the same respective amendment provisions as the previous governing documents or, if there were no amendment provisions in the previous governing document, amendment provisions that require approval of not less than two-thirds of the affected parcel owners;
- Contain no covenants that are more restrictive on the affected parcel owners than the covenants contained in the previous governing documents, except as allowed under s. 720.404(3), F.S.; and
- Comply with the other requirements for a declaration of covenants and other governing documents as specified in ch. 720, F.S.

This bill amends section 720.405(4), F.S., removing subsection (d), which provides that a proposed revived declaration and other governing documents of the community must contain no covenants that are more restrictive on the affected parcel owners than the covenants contained in the previous governing documents. By removing this provision it appears that revived declarations and other governing documents could have covenants that are more restrictive than covenants contained in previous governing documents.

This change has possible constitutional problems and seems to be inconsistent with s. 720.404(3), F.S., which provides that "the revived declaration may not contain covenants that are more restrictive on the parcel owners than the covenants contained in the previous declaration". The statute then lists a few narrow exceptions to the general rule. Removing the requirement in s. 720.405(4)(d), F.S., could allow more restrictive covenants to be placed on a parcel owner's property than the parcel owner agreed to in the original declaration.

C. SECTION DIRECTORY:

Section 1 creates s. 712.11, F.S., to provide that homeowners' associations may use procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of Chapter 712, F.S.

Section 2 amends s. 718.110, F.S., providing for certain procedures for amending declarations of condominium, articles of incorporation, or bylaws, where the declarations of condominium, articles of incorporation, or bylaws requires the association to obtain consent and joinder of mortgagees.

Section 3 amends s. 720.302, F.S., to provide an exception to the current law that ch. 720, F.S., does not apply to any association under ch. 718, F.S., ch. 719, F.S., or ch. 721, F.S.

Section 4 amends s. 720.303, F.S., to provide that provisions under 720.303(2), F.S. also apply to committee meetings when a decision will be made on spending association funds, and to meetings of any body that has the power to make architectural decisions. This section also amends 720.303(5), F.S., to provide for when an association is not required to provide information about the residential subdivision or the association, that the association may charge a fee up to $500 for providing this information, and for when an association is not liable for providing such information. This section amends 720.303(7), F.S., revising the time period for when an association must prepare and complete a financial report for the preceding fiscal year.

Section 5 repeals s. 720.303(2), F.S.

Section 6 amends s. 720.306, F.S., revising provisions pertaining to meetings of members and amendments providing that merger or consolidation of associations is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel, and providing that members and parcel owners have the right to speak at any meeting in reference to all agenda items.

Section 7 amends s. 720.311, F.S., revising the dispute resolution provisions for disputes between an association and a parcel owner. This section removes all references to the Department of Business and Professional Regulation. This section also provides a statutory form to be used as the written offer to participate in presuit mediation, and provides that service of the offer be accomplished by sending the offer in a certain manner.

Section 8 amends s. 720.405, F.S., revising provisions relating to the proposed revived declaration and other governing documents for the community.

Section 9 provides an effective date of July 1, 2006, except as otherwise expressly provided in this bill.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Unknown. See Fiscal Comments.

2. Expenditures:

   Unknown. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may allow increased costs to purchasers or sellers of homes that are in a homeowners association. The fee cannot exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

It is unclear whether this bill will increase or decrease the cost to homeowners and homeowners associations relating to mediation of disputes. Under current law, such disputes are mediated by the Department of Business and Professional Regulation for $200. This bill eliminates the $200 fee, but requires private mediation at a cost to be negotiated between the parties.

D. FISCAL COMMENTS:

This bill appears to reduce recurring revenues and recurring expenses of the Department of Business and Professional Regulation. This bill eliminates the responsibility for conducting homeowners association mediation, and eliminates the $200 fee charged per mediation. The department has not provided a fiscal estimate.[13]

[13] Fiscal comments requested on January 17, 2006.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

This bill amends s. 718.110, F.S., providing that any provision in the declaration of condominium, articles of incorporation, or bylaws that requires consent or joinder of mortgagees to be obtained to pass an amendment to either of these documents "shall be void to the extent not limited to amendments materially affecting the rights or interests of the mortgagees". Passage of this bill would make any provision requiring consent or joinder from mortgagees before amending the above documents void. There is no provision in the bill saying whether this would only affect declarations, articles of incorporation, or bylaws that are passed after the effective date of the bill. Therefore, this bill could be interpreted as pertaining to all declarations, articles of incorporation, or bylaws that have consent or joinder requirements, existing before the effective date of the bill and after.

This bill also provides that, for mortgages in existence prior to the effective date of this bill, associations can modify their declarations, articles of incorporation, or bylaws to require mortgagees to provide notice to the association of their contact information in order to be eligible to receive notices regarding proposed amendments. All the associations must do is notify all mortgagees of the need to provide this contact information. This bill then provides that if mortgagees do not provide the information then the mortgagees will be deemed to have consented to all amendments.

Article I, s. 10, Fla.Const., provides:

> **SECTION 10. Prohibited laws.**--No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

A mortgage is a contract between a lender and a property owner. It is possible that a lender may have agreed to lend money to a condominium owner only if the lender would receive certain notifications and have the opportunity to object to amendments that could adversely affect the lender. To the extent that a lender relied on such provisions, this bill may affect the lender's ability to enforce such contract terms. If so, this bill may perhaps impair the obligation of a contract and this portion of the bill may not be enforced by a court.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

A bill to be entitled

An act relating to community associations; creating s. 712.11, F.S.; providing for the revival of certain declarations that have been extinguished; amending s. 718.110, F.S.; revising provisions relating to the amendment of declarations; providing legislative findings and a finding of compelling state interest; requiring a holder of a recorded mortgage on a condominium unit that requires the consent or joinder of a mortgagee to an amendment to provide certain information to a condominium association; providing definitions; providing criteria for consent to an amendment; requiring notice regarding proposed amendments to mortgagees; providing criteria for notification; requiring the association to conduct a diligent search to identify mortgagees; requiring the association's representative to execute an affidavit confirming that a diligent search was conducted; prohibiting the declaration of condominium, articles of incorporation, or bylaws from requiring the consent or joinder of more than a specified percent of the eligible mortgagees in connection with proposed amendments under certain conditions; providing criteria for enforcement; requiring mortgagees seeking to disapprove a proposed amendment to provide certain information to the association; providing for the recovery of certain costs and attorney's fees; amending s. 720.302, F.S.; revising governing provisions relating to corporations not for profit that operate residential homeowners' associations;

amending s. 720.303, F.S.; providing that special assessments may not be levied at a board meeting except under certain circumstances; revising provisions relating to the closed-circuit cable broadcast notice requirement; authorizing the association to charge a reasonable fee for providing good faith responses to certain requests for information by or on behalf of a prospective purchaser or lienholder; providing conditions for exemption from liability for providing such information; revising when the association must have its financial report completed and provided to members; repealing s. 720.303(2), F.S., as amended, relating to board meetings, to remove conflicting versions of that subsection; amending s. 720.306, F.S.; providing that certain mergers or consolidations of an association shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel; revising provisions relating to items that members and parcel owners may address at membership meetings; amending s. 720.311, F.S.; revising provisions relating to dispute resolution; providing that the filing of any petition for arbitration or the serving of an offer for presuit mediation shall toll the applicable statute of limitations; providing that certain disputes between an association and a parcel owner shall be subject to presuit mediation; revising provisions to conform; providing that temporary injunctive relief may be sought in certain disputes subject to presuit mediation; authorizing the court to refer the parties to mediation

under certain circumstances; requiring the aggrieved party to serve on the responding party a written offer to participate in presuit mediation; providing a form for such offer; providing that service of the offer is effected by the sending of such an offer in a certain manner; providing that the prevailing party in any subsequent arbitration or litigation proceedings is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process; requiring the mediator or arbitrator to meet certain certification requirements; removing a requirement relating to development of an education program to increase awareness of the operation of homeowners' associations and the use of alternative dispute resolution techniques; amending s. 720.405, F.S.; revising provisions relating to the proposed revived declaration and other governing documents for the community; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 712.11, Florida Statutes, is created to read:

712.11 Covenant revitalization.--A homeowners' association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403-720.407 to revive covenants that have lapsed under the terms of this chapter.

Section 2. Effective October 1, 2006, subsection (11) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.--

(11) (a) Notwithstanding any provision to the contrary contained in this section, any provision in the declaration of condominium, articles of incorporation, or bylaws that requires ~~declaration recorded after April 1, 1992, may not require~~ the consent or joinder of some or all mortgagees of units or any other portion of the condominium property to or in amendments to the declaration of condominium, articles of incorporation, or bylaws shall be void to the extent not~~, unless the requirement is~~ limited to amendments materially affecting the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, and any consent or joinder shall ~~unless the requirement provides that such consent may~~ not be unreasonably withheld. It shall be presumed that, except as to those matters described in subsections (4) and (8) or other issues materially affecting the mortgagee's security interest in the property, amendments to the declaration of condominium, articles of incorporation, or bylaws do not materially affect the rights or interests of mortgagees. In the event mortgagee consent is provided other than by properly recorded joinder, such consent shall be evidenced by affidavit of the association recorded in the public records of the county where the declaration of condominium, articles of incorporation, or bylaws are ~~is~~ recorded.

(b) The Legislature finds that the procurement of mortgagee consent or joinder to amendments that do not

materially affect the rights or interests of mortgagees is an unreasonable and substantial logistical and financial burden on the unit owners and condominium associations and that there is a compelling state interest in enabling the members of a condominium association to approve amendments. Accordingly, any holder of a recorded mortgage on a condominium unit or any other portion of a condominium, which mortgage is first recorded after October 1, 2006, and for which the declaration of condominium, articles of incorporation, or bylaws require the consent or joinder of a mortgagee to an amendment, must provide written notice by certified mail to the association of the address at which the mortgagee may be contacted in regard to any proposed amendments. The association shall maintain the names and addresses of such mortgagees in a registry of mortgagees, which the association shall utilize when sending a request for such consent or joinder. A request for consent or joinder must be mailed to a mortgagee by certified mail, return receipt requested, to the address provided by the mortgagee and retained in the registry of mortgagees. As used in this subsection, "certified mail" means either certified or registered mail, return receipt requested. Consent to an amendment shall be deemed to have been given by any holder of a mortgage that is first recorded after October 1, 2006, and who fails to provide the required written notice and contact information. Also, any mortgagee who fails to respond by certified mail within 30 days after the date the association mails a request for consent or joinder shall be deemed to have consented to the proposed amendment.

(c) As to mortgages in existence as of October 1, 2006, in those condominiums where the consent or joinder of such mortgagees is required in connection with amendments to the governing documents, and where such mortgagees are not otherwise required by the existing declaration of condominium, articles of incorporation, or bylaws to provide notice to the association of their contact information in order to be eligible to receive notices regarding proposed amendments, those condominium associations that wish to modify provisions in the declaration of condominium, articles of incorporation, or bylaws that require the consent or joinder of mortgagees must notify all mortgagees who hold mortgages on units within the condominium or other portions of the condominium property of the need to provide the same contact information as required in paragraph (b). Any mortgagee who does not provide contact information as required will be deemed to have consented to all future proposed amendments. Further, once the proper address for notifying existing mortgagees has been obtained in the manner provided for in this subsection, failure of any mortgagee to respond to a request for the consent or joinder to a proposed amendment within 30 days after the date that such request is sent to the mortgagee by certified mail shall be deemed to have consented to such amendment. In order to properly notify holders of existing mortgages:

1. The condominium association must first conduct a diligent search to identify all existing mortgagees and an address for the required notice to be sent to each mortgagee. Service of the notice shall be on the mortgagee's registered

agent based upon the information available from the Secretary of State. Where there is no registered agent, the notice shall be sent to the address in the original recorded mortgage unless there is a different address in a more recently recorded assignment or modification instrument or in the records maintained by the condominium association. All notices must be sent by certified mail and must advise the mortgagee that if he or she fails to provide the contact information requested within 30 days after the date of mailing of the certified letter from the association, such mortgagee shall be deemed to have consented to the proposed amendment.

2. An affidavit must be executed by a representative of the condominium association confirming that a diligent search has been conducted to identify all outstanding mortgages on the condominium in the manner provided for in subparagraph 1. and summarizing the steps that were taken in connection with such diligent search and the notification of all mortgagees, and such affidavit shall be placed in the association's minute book as an attachment to the minutes of the meeting in which the board of directors considers such affidavit.

(d) After October 1, 2006, no new declaration of condominium, articles of incorporation, or bylaws may require the consent or joinder of more than 51 percent of the eligible mortgagees in connection with any proposed amendment unless a higher percentage is required in order to comply with the requirements of the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation. Any new declaration of condominium, articles of incorporation, or bylaws must also

require mortgagees to provide to the condominium association the address to which notices may be sent, as provided for in paragraph (b), in order for such mortgagees to have the right to be contacted in connection with any proposed amendment.

(e) A provision requiring the consent or joinder of some or all holders of mortgages on units or other portions of the condominium property to any proposed amendment shall be enforceable only by mortgagees of record as of the date an amendment is recorded in the public records and only by those mortgagees who have complied with the requirements of paragraph (b) or paragraph (c). Any amendment adopted without the required consent of a mortgagee shall be deemed voidable by any mortgagee who was entitled to notice and the opportunity to consent, and actions to void such amendments shall be subject to the statute of limitations applicable to actions founded upon written instruments, which statute shall commence to run as of the date such amendment is recorded in the public records and, for amendments recorded prior to October 1, 2006, shall commence on October 1, 2006.

(f) In order to establish that he or she is not unreasonably withholding consent, any mortgagee who seeks to disapprove of a proposed amendment by withholding his or her consent or joinder must include in his or her reply to the condominium association's request for consent or joinder a statement of the specific reasons the proposed amendment is claimed to materially and adversely affect the rights and interests of such mortgagee.

(g) In connection with any litigation between a condominium association and a lender with regard to whether consent has been improperly or unreasonably withheld, the prevailing party shall be entitled to recover his or her costs and reasonable attorney's fees.

Section 3. Subsections (4) and (5) of section 720.302, Florida Statutes, are amended to read:

720.302 Purposes, scope, and application.--

(4) This chapter does not apply to any association that is subject to regulation under chapter 718, chapter 719, or chapter 721~~,~~ or to any nonmandatory association formed under chapter 723, except to the extent that a provision of chapter 718, chapter 719, or chapter 721 is expressly incorporated into this chapter for the purpose of regulating homeowners' associations.

(5) Unless expressly stated to the contrary, corporations not for profit that operate residential homeowners' associations in this state shall be governed by and subject to chapter 607, if the association was incorporated thereunder, or to chapter 617, if the association was incorporated thereunder, and this chapter. This subsection is intended to clarify existing law.

Section 4. Subsections (2) and (7) of section 720.303, Florida Statutes, as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, are amended, and paragraphs (d) and (e) are added to subsection (5) of that section, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.--

(2) BOARD MEETINGS.--

(a) A meeting of the board of directors of an association occurs whenever a quorum of the board gathers to conduct association business. All meetings of the board must be open to all members except for meetings between the board and its attorney with respect to proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege. The provisions of this subsection shall also apply to the meetings of any committee or other similar body when a final decision will be made regarding the expenditure of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

(b) Members have the right to attend all meetings of the board and to speak on any matter placed on the agenda by petition of the voting interests for at least 3 minutes. The association may adopt written reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member statements, which rules must be consistent with this paragraph and may include a sign-up sheet for members wishing to speak. Notwithstanding any other law, the requirement that board meetings and committee meetings be open to the members is inapplicable to meetings between the board or a committee and the association's attorney, with respect to meetings of the board held for the purpose of discussing personnel matters.

(c) The bylaws shall provide for giving notice to parcel owners and members of all board meetings and, if they do not do so, shall be deemed to provide the following:

1. Notices of all board meetings must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency. In the alternative, if notice is not posted in a conspicuous place in the community, notice of each board meeting must be mailed or delivered to each member at least 7 days before the meeting, except in an emergency. Notwithstanding this general notice requirement, for communities with more than 100 members, the bylaws may provide for a reasonable alternative to posting or mailing of notice for each board meeting, including publication of notice, provision of a schedule of board meetings, or the conspicuous posting and repeated broadcasting of the notice on a closed-circuit cable television system serving the homeowners' association. However, if broadcast notice is used in lieu of a notice posted physically in the community, the notice must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required. When broadcast notice is provided, the notice ~~and agenda~~ must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice ~~and the agenda~~. The bylaws or amended bylaws may provide for giving notice by electronic transmission in a manner authorized by law for meetings of the board of directors, committee meetings requiring notice under this section, and annual and special meetings of the members;

however, a member must consent in writing to receiving notice by electronic transmission.

2. A special ~~An~~ assessment may not be levied at a board meeting unless the notice of the meeting includes a statement that special assessments will be considered and the nature of the special assessments. Written notice of any meeting at which special assessments will be considered or at which amendments to rules regarding parcel use will be considered must be mailed, delivered, or electronically transmitted to the members and parcel owners and posted conspicuously on the property or broadcast on closed-circuit cable television not less than 14 days before the meeting.

3. Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. ~~This subsection also applies to the meetings of any committee or other similar body, when a final decision will be made regarding the expenditure of association funds, and to any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.~~

(d) If 20 percent of the total voting interests petition the board to address an item of business, the board shall at its next regular board meeting or at a special meeting of the board, but not later than 60 days after the receipt of the petition, take the petitioned item up on an agenda. The board shall give all members notice of the meeting at which the petitioned item shall be addressed in accordance with the 14-day notice

requirement pursuant to subparagraph (c)2. Each member shall have the right to speak for at least 3 minutes on each matter placed on the agenda by petition, provided that the member signs the sign-up sheet, if one is provided, or submits a written request to speak prior to the meeting. Other than addressing the petitioned item at the meeting, the board is not obligated to take any other action requested by the petition.

(5) INSPECTION AND COPYING OF RECORDS.--The official records shall be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(d) The association or its authorized agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association other than information or documents required by this chapter to be made available or disclosed. The association or its authorized agent may charge a reasonable fee to the prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than that required by law, if the fee does not exceed $150 plus

the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

(e) An association and its authorized agent are not liable for providing such information in good faith pursuant to a written request if the person providing the information includes a written statement in substantially the following form: "The responses herein are made in good faith and to the best of my ability as to their accuracy."

(7) FINANCIAL REPORTING.--Within 90 days after the end of the fiscal year, or annually on a date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall ~~prepare an annual financial report within 60 days after the close of the fiscal year. The association shall, within the time limits set forth in subsection (5),~~ provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b)1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial statements required by paragraph (a) unless the governing documents provide otherwise.

3. A report of cash receipts and disbursement must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as applicable: costs for security, professional, and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves if maintained by the association.

(c) If 20 percent of the parcel owners petition the board for a level of financial reporting higher than that required by

this section, the association shall duly notice and hold a meeting of members within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that fiscal year. Upon approval of a majority of the total voting interests of the parcel owners, the association shall prepare or cause to be prepared, shall amend the budget or adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the governing documents, and shall provide within 90 days of the meeting or the end of the fiscal year, whichever occurs later:

1. Compiled, reviewed, or audited financial statements, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is otherwise required to prepare compiled financial statements; or

3. Audited financial statements if the association is otherwise required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 5. Subsection (2) of section 720.303, Florida Statutes, as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, is repealed.

Section 6. Paragraph (c) of subsection (1) and subsection (6) of section 720.306, Florida Statutes, are amended to read:

720.306 Meetings of members; voting and election procedures; amendments.--

(1) QUORUM; AMENDMENTS.--

(c) Unless otherwise provided in the governing documents as originally recorded or permitted by this chapter or chapter 617, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment. For purposes of this section, a change in quorum requirements is not an alteration of voting interests. The merger or consolidation of one or more associations under a plan of merger or consolidation under chapter 607 or chapter 617 shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

(6) RIGHT TO SPEAK.--Members and parcel owners have the right to attend all membership meetings and to speak at any meeting with reference to all items ~~opened for discussion or~~

included on the agenda. Notwithstanding any provision to the contrary in the governing documents or any rules adopted by the board or by the membership, a member and a parcel owner have the right to speak for at least 3 minutes on any agenda item, provided that the member or parcel owner submits a written request to speak prior to the meeting. The association may adopt written reasonable rules governing the frequency, duration, and other manner of member and parcel owner statements, which rules must be consistent with this subsection.

Section 7. Section 720.311, Florida Statutes, is amended to read:

720.311 Dispute resolution.--

(1) The Legislature finds that alternative dispute resolution has made progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to litigation. The filing of any petition for ~~mediation or~~ arbitration or the serving of an offer for presuit mediation as provided for in this section shall toll the applicable statute of limitations. Any recall dispute filed with the department pursuant to s. 720.303(10) shall be conducted by the department in accordance with the provisions of ss. 718.112(2)(j) and 718.1255 and the rules adopted by the division. In addition, the department shall conduct mandatory binding arbitration of election disputes between a member and an association pursuant to s. 718.1255 and rules adopted by the division. Neither election disputes nor recall disputes are eligible for presuit mediation; these disputes shall be arbitrated by the department. At the conclusion of the proceeding, the department shall charge

the parties a fee in an amount adequate to cover all costs and expenses incurred by the department in conducting the proceeding. Initially, the petitioner shall remit a filing fee of at least $200 to the department. The fees paid to the department shall become a recoverable cost in the arbitration proceeding, and the prevailing party in an arbitration proceeding shall recover its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. The department shall adopt rules to effectuate the purposes of this section.

(2)(a) Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of an offer ~~filed with the department~~ for presuit ~~mandatory~~ mediation served by an aggrieved party before the dispute is filed in court. Presuit mediation proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure, and these proceedings are privileged and confidential to the same extent as court-ordered mediation. Disputes subject to presuit mediation under this section shall not include the collection of any assessment, fine, or other financial obligation, including attorney's fees and costs, claimed to be due or any action to enforce a prior mediation settlement agreement between the parties. Also, in any dispute subject to

presuit mediation under this section where emergency relief is required, a motion for temporary injunctive relief may be filed with the court without first complying with the presuit mediation requirements of this section. After any issues regarding emergency or temporary relief are resolved, the court may either refer the parties to a mediation program administered by the courts or require mediation under this section. An arbitrator or judge may not consider any information or evidence arising from the presuit mediation proceeding except in a proceeding to impose sanctions for failure to attend a presuit mediation session or with the parties' agreement in a proceeding seeking to enforce the agreement. Persons who are not parties to the dispute may not attend the presuit mediation conference without the consent of all parties, except for counsel for the parties and a corporate representative designated by the association. When mediation is attended by a quorum of the board, such mediation is not a board meeting for purposes of notice and participation set forth in s. 720.303. An aggrieved party shall serve on the responding party a written offer to participate in presuit mediation in substantially the following form:

STATUTORY OFFER TO PARTICIPATE IN PRESUIT MEDIATION

The alleged aggrieved party, _____, hereby offers to _____, as the responding party, to enter into presuit mediation in connection with the following dispute, which by statute is of a type that

is subject to presuit mediation:

(List specific nature of the dispute or disputes to be mediated and the authority supporting a finding of a violation as to each dispute.)

Pursuant to section 720.311, Florida Statutes, this offer to resolve the dispute through presuit mediation is required before a lawsuit can be filed concerning the dispute. Pursuant to the statute, the aggrieved party is hereby offering to engage in presuit mediation with a neutral third-party mediator in order to attempt to resolve this dispute without court action, and the aggrieved party demands that you likewise agree to this process. If you fail to agree to presuit mediation, or if you agree and later fail to follow through with your agreement to mediate, suit may be brought against you without further warning.

The process of mediation involves a supervised negotiation process in which a trained, neutral third-party mediator meets with both parties and assists them in exploring possible opportunities for resolving part or all of the dispute. The mediation process is a voluntary one. By agreeing to participate in presuit mediation, you are not bound in any way to change your position or to enter into any type of agreement. Furthermore, the mediator has no authority to make any

decisions in this matter or to determine who is right or wrong and merely acts as a facilitator to ensure that each party understands the position of the other party and that all reasonable settlement options are fully explored.

If an agreement is reached, it shall be reduced to writing and becomes a binding and enforceable commitment of the parties. A resolution of one or more disputes in this fashion avoids the need to litigate these issues in court. The failure to reach an agreement, or the failure of a party to participate in the process, results in the mediator's declaring an impasse in the mediation, after which the aggrieved party may proceed to court on all outstanding, unsettled disputes.

The aggrieved party has selected and hereby lists three certified mediators who we believe to be neutral and qualified to mediate the dispute. You have the right to select any one of these mediators. The fact that one party may be familiar with one or more of the listed mediators does not mean that the mediator cannot act as a neutral and impartial facilitator. Any mediator who cannot act in this capacity ethically must decline to accept engagement. The mediators that we suggest, and their current hourly rates, are as follows:

(List the names, addresses, telephone numbers, and hourly rates of the mediators. Other pertinent information about the background of the mediators may be included as an attachment.)

You may contact the offices of these mediators to confirm that the listed mediators will be neutral and will not show any favoritism toward either party. The names of certified mediators may be found through the office of the clerk of the circuit court for this circuit.

If you agree to participate in the presuit mediation process, the statute requires that each party is to pay one-half of the costs and fees involved in the presuit mediation process unless otherwise agreed by all parties. An average mediation may require 3 to 4 hours of the mediator's time, including some preparation time, and each party would need to pay one-half of the mediator's fees as well as his or her own attorney's fees if he or she chooses to employ an attorney in connection with the mediation. However, use of an attorney is not required and is at the option of each party. The mediator may require the advance payment of some or all of the anticipated fees. The aggrieved party hereby agrees to pay or prepay one-half of the mediator's estimated fees and

to forward this amount or such other reasonable advance deposits as the mediator may require for this purpose. Any funds deposited will be returned to you if these are in excess of your share of the fees incurred.

If you agree to participate in presuit mediation in order to attempt to resolve the dispute and thereby avoid further legal action, please sign below and clearly indicate which mediator is acceptable to you. We will then ask the mediator to schedule a mutually convenient time and place for the mediation conference to be held. The mediation conference must be held within 90 days after the date of this letter unless extended by mutual written agreement. In the event that you fail to respond within 20 days after the date of this letter, or if you fail to agree to at least one of the mediators that we have suggested and to pay or prepay to the mediator one-half of the costs involved, the aggrieved party will be authorized to proceed with the filing of a lawsuit against you without further notice and may seek an award of attorney's fees or costs incurred in attempting to obtain mediation.

Should you wish, you may also elect to waive presuit mediation so that this matter may proceed directly to court.

Therefore, please give this matter your immediate attention. By law, your response must be mailed by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail to the address shown on this offer.

_____

_____

RESPONDING PARTY: CHOOSE ONLY ONE OF THE TWO OPTIONS BELOW. YOUR SIGNATURE INDICATES YOUR AGREEMENT TO THAT CHOICE.

AGREEMENT TO MEDIATE

The undersigned hereby agrees to participate in presuit mediation and agrees to the following mediator or mediators as acceptable to mediate this dispute:

(List acceptable mediator or mediators.)

I/we further agree to pay or prepay one-half of the mediator's fees and to forward such advance deposits as the mediator may require for this purpose.

_____

Signature of responding party #1

_____

Signature of responding party #2 (if applicable) (if property is owned by more than one person, all owners must sign)

WAIVER OF MEDIATION

The undersigned hereby waives the right to participate in presuit mediation of the dispute listed above and agrees to allow the aggrieved party to proceed in court on such matters.

_____

Signature of responding party #1

_____

Signature of responding party #2 (if applicable) (if property is owned by more than one person, all owners must sign)

(b) Service of the statutory offer to participate in presuit mediation shall be effected by sending a letter in substantial conformity with the above form by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail, to the address of the responding party as it last appears on the books and records of the association. The responding party shall have 20 days from the date of the

mailing of the statutory offer to serve a response to the aggrieved party in writing. The response shall be served by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail, to the address shown on the statutory offer. In the alternative, the responding party may waive mediation in writing. Notwithstanding the foregoing, once the parties have agreed on a mediator, the mediator may reschedule the mediation for a date and time mutually convenient to the parties. ~~The department shall conduct the proceedings through the use of department mediators or refer the disputes to private mediators who have been duly certified by the department as provided in paragraph (c).~~ The parties shall share the costs of presuit mediation equally, including the fee charged by the mediator, if any, unless the parties agree otherwise, and the mediator may require advance payment of its reasonable fees and costs. The failure of any party to respond to a demand or response, to agree upon a mediator, to make payment of fees and costs within the time established by the mediator, or to appear for a scheduled mediation session shall operate as an impasse in the presuit mediation by such party, entitling the other party to proceed in court and to seek an award of the costs and fees associated with the mediation. Additionally, if any presuit mediation session cannot be scheduled and conducted within 90 days after the offer to participate in mediation was filed, an impasse shall be deemed to have occurred unless both parties agree to extend this deadline. ~~If a department mediator is used, the department may charge such fee as is necessary to pay expenses of the~~

~~mediation, including, but not limited to, the salary and benefits of the mediator and any travel expenses incurred. The petitioner shall initially file with the department upon filing the disputes, a filing fee of $200, which shall be used to defray the costs of the mediation. At the conclusion of the mediation, the department shall charge to the parties, to be shared equally unless otherwise agreed by the parties, such further fees as are necessary to fully reimburse the department for all expenses incurred in the mediation.~~

(c)~~(b)~~ If presuit mediation as described in paragraph (a) is not successful in resolving all issues between the parties, the parties may file the unresolved dispute in a court of competent jurisdiction or elect to enter into binding or nonbinding arbitration pursuant to the procedures set forth in s. 718.1255 and rules adopted by the division, with the arbitration proceeding to be conducted by a department arbitrator or by a private arbitrator certified by the department. If all parties do not agree to arbitration proceedings following an unsuccessful mediation, any party may file the dispute in court. A final order resulting from nonbinding arbitration is final and enforceable in the courts if a complaint for trial de novo is not filed in a court of competent jurisdiction within 30 days after entry of the order. As to any issue or dispute that is not resolved at presuit mediation, and as to any issue that is settled at presuit mediation but is thereafter subject to an action seeking enforcement of the mediation settlement, the prevailing party in any subsequent arbitration or litigation proceeding shall be

entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process.

(d) ~~(c) The department shall develop a certification and training program for private mediators and private arbitrators which shall emphasize experience and expertise in the area of the operation of community associations.~~ A mediator or arbitrator shall be certified to conduct mediation or arbitration under this section ~~by the department~~ only if he or she has been certified as a circuit court civil mediator or arbitrator, respectively, pursuant to the requirements established ~~attended at least 20 hours of training in mediation or arbitration, as appropriate, and only if the applicant has mediated or arbitrated at least 10 disputes involving community associations within 5 years prior to the date of the application, or has mediated or arbitrated 10 disputes in any area within 5 years prior to the date of application and has completed 20 hours of training in community association disputes. In order to be certified by the department, any mediator must also be certified~~ by the Florida Supreme Court. ~~The department may conduct the training and certification program within the department or may contract with an outside vendor to perform the training or certification. The expenses of operating the training and certification and training program shall be paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection and by the training fees.~~

(e) ~~(d)~~ The presuit mediation procedures provided by this subsection may be used by a Florida corporation responsible for the operation of a community in which the voting members are parcel owners or their representatives, in which membership in the corporation is not a mandatory condition of parcel ownership, or which is not authorized to impose an assessment that may become a lien on the parcel.

~~(3) The department shall develop an education program to assist homeowners, associations, board members, and managers in understanding and increasing awareness of the operation of homeowners' associations pursuant to this chapter and in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Such education program may include the development of pamphlets and other written instructional guides, the holding of classes and meetings by department employees or outside vendors, as the department determines, and the creation and maintenance of a website containing instructional materials. The expenses of operating the education program shall be initially paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection.~~

Section 8. Paragraphs (c), (d), and (e) of subsection (4) of section 720.405, Florida Statutes, are amended to read:

720.405 Organizing committee; parcel owner approval.--

(4) The proposed revived declaration and other governing documents for the community shall:

(c) Contain the same respective amendment provisions as the previous governing documents or, if there were no amendment provisions in the previous governing document, amendment provisions that require approval of not less than two-thirds of the affected parcel owners; and

(d) ~~Contain no covenants that are more restrictive on the affected parcel owners than the covenants contained in the previous governing documents, except as permitted under s. 720.404(3); and~~

~~(e)~~ Comply with the other requirements for a declaration of covenants and other governing documents as specified in this chapter.

Section 9. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 0391**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Domino offered the following:

Amendment

Remove line(s) 381-389 and insert:

within the time limits sets forth in subsection (5)~~,~~ provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles as adopted by the Florida Board of Accountancy. The financial statements shall be based

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2 (for drafter's use only)

Bill No. **HB 0391**

2

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Domino offered the following:

Amendment (with directory and title amendments)

Insert between line(s) 370 and 371:

(6) BUDGETS.--

(a) The association shall prepare an annual budget which sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year. The budget must set out separately all fees or charges for recreational amenities, whether owned by the association, the developer, or another person. The association shall provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. The copy must be provided to the member within the time limits set forth in subsection (5).

(b) In addition to annual operating expenses, the budget shall include reserve accounts for capital expenditures and deferred maintenance. These accounts shall include, but are not limited to, roof replacement, building painting, and pavement

resurfacing, regardless of the amount of deferred maintenance expense or replacement cost, and for any other item for which the deferred maintenance expense or replacement cost exceeds $10,000. The amount to be reserved shall be computed by means of a formula which is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates or extension of the useful life of a reserve item caused by deferred maintenance. This subsection does not apply to an adopted budget in which the members of an association have determined, by a majority vote at a duly called meeting of the association, to provide no reserves or less reserves than required by this subsection. However, prior to turnover of control of an association by a developer to unit owners, the developer may vote to waive the reserves or reduce the funding of reserves for the first 2 fiscal years of the association's operation, beginning with the fiscal year in which the initial declaration is recorded, after which time reserves may be waived or reduced only upon the vote of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves, and no such result is achieved or a quorum is not attained, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves.

(c) Funding formulas for reserves required by this section shall be based on either a separate analysis of each of the

required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account shall be the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero; and

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component. The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may consider factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall be not less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful lives of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings

from investment of principal. The reserve funding formula shall not include any type of balloon payments.

(d) Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts, and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a duly called meeting of the association. Prior to turnover of control of an association by a developer to unit owners, the developer-controlled association shall not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all non-developer voting interests, voting in person or by limited proxy at a duly called meeting of the association.

========== D I R E C T O R Y A M E N D M E N T ==========

Remove line 244 and insert:

Section 4. Subsections (2), (6) and (7) of section 720.303,

========== T I T L E A M E N D M E N T ==========

Remove line 37 and insert:

liability for providing such information; revising what must be included in an association's annual budget; revising when

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 3 (for drafter's use only)

Bill No. **HB 0391**

3

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Domino offered the following:

Amendment (with title amendments)

Insert between line(s) 481-482 and insert:

Section 7. Paragraph (t) is added to subsection (3) of section 720.307, Florida Statutes, to read:

(3) At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board:

(t) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited by an independent certified public accountant for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in

accordance with generally accepted auditing standards, as prescribed by the Florida Board of Accountancy, pursuant to chapter 473. The certified public accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine if expenditures were for association purposes and the billings, cash receipts, and related records to determine that the developer was charged and paid the proper amounts of assessments.

========== T I T L E A M E N D M E N T ==========

Remove line 47 and insert:

membership meetings; amending s. 720.307, F.S.; providing additional documents that the developer must deliver at the time the association members elect the board of directors; amending 720.311, F.S.; revising

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 4 (for drafter's use only)

Bill No. **HB 0391**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

4

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Domino offered the following:

Amendment (with title amendments)

Insert between line(s) 481-482:

Section 7. Section 720.308, Florida Statutes, is amended to read:

720.308 Assessments and charges.--

(1) ASSESSMENTS.--For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof. Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors. While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated

itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association. This section does not apply to an association, no matter when created, if the association is created in a community that is included in an effective development-of-regional-impact development order as of the effective date of this act, together with any approved modifications thereto.

(2) GUARANTEES OF COMMON EXPENSES--

(a) *Establishment of the guarantee.*-- If a guarantee is not included in the purchase contracts, declaration, or prospectus, any agreement establishing a guarantee shall be effective only upon the approval of a majority of the voting interests of the members other than the developer. Approval shall be expressed at a meeting of the members, voting in person or by limited proxy; or by agreement in writing without a meeting if provided in the bylaws. Such guarantee shall meet the requirements of this section.

1. Guarantee period.-- The period of time for the guarantee shall be indicated by a specific beginning and ending date or event.

a. The ending date or event shall be the same for all of the members of a homeowners' association, including members in different phases of homeowners' associations.

b. The guarantee may provide for different intervals of time during a guarantee period with different dollar amounts for each such interval.

c. The guarantee may provide that after the initial stated period, the developer has an option to extend the guarantee for one or more additional stated periods. The extension of a guarantee is limited to extending the ending date or event;

therefore, the developer does not have the option of changing the level of assessments guaranteed.

(3) MAXIMUM LEVEL OF ASSESSMENTS.-- The stated dollar amount of the guarantee shall be an exact dollar amount for each parcel identified in the declaration. Regardless of the stated dollar amount of the guarantee, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate ownership share of the common elements.

(4) CASH FUNDING REQUIREMENTS DURING THE GUARANTEE.-- The cash payments required from the guarantor during the guarantee period shall be determined as follows:

(a) If at any time during the guarantee period the funds collected from member assessments at the guaranteed level and other revenues collected by the association are not sufficient to provide payment, on a timely basis, of all common expenses, including the full funding of the reserves unless properly waived, the guarantor shall advance sufficient cash to the association at the time such payments are due; and

(b) Expenses incurred in the production of non-assessment revenues, not in excess of the non-assessment revenues, shall not be included in the common expenses. If the expenses attributable to non-assessment revenues exceed non-assessment revenues only the excess expenses must be funded by the guarantor. For example, if the association operates a rental program in which rental expenses exceed rental revenues the guarantor shall fund the rental expenses in excess of the rental revenues. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment, such expense shall not be charged to the

guarantor, and the net investment income shall be retained by the association. Each such non-assessment revenue generating activity shall be considered separately. Capital contributions collected from members are not revenues, and shall not be used to pay common expenses.

(5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.-- The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula:

(a) The guarantor shall fund the total common expenses incurred during the guarantee period, including the full funding of the reserves unless properly waived; less

(b) The total regular periodic assessments earned by the association from the members other than the guarantor during the guarantee period regardless of whether the actual level charged was less than the maximum guaranteed amount.

(6) EXPENSES.--Expenses incurred in the production of non-assessment revenues, not in excess of the non-assessment revenues, shall not be included in the common expenses. If the expenses attributable to non-assessment revenues exceed non-assessment revenues only the excess expenses must be funded by the guarantor. For example, if the association operates a rental program in which rental expenses exceed rental revenues the guarantor shall fund the rental expenses in excess of the rental revenues. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment, such expense shall not be charged to the guarantor, and the net investment income shall be retained by the association. Each such non-assessment revenue generating activity shall be considered separately. Capital contributions

collected from members are not revenues, and shall not be used to pay common expenses.

========== T I T L E A M E N D M E N T ==========

Remove line 47 and insert:

membership meetings; amending s. 720.308, F.S.; providing for the establishment of guarantees of common expenses shared by the association members; amending s.720.311, F.S.; revising

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 5 (for drafter's use only)

Bill No. **HB 0391**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

5

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Adams offered the following:

Amendment (with directory and title amendments)

Between lines 450-451, insert:

Section 6. Subsection (1) of section 720.305, Florida Statues, is amended to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights; failure to fill sufficient number of vacancies on board of directors to constitute a quorum; appointment of receiver upon petition of any member.--

(1) Each member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress alleged failure or refusal to comply with these provisions may be brought by the association or by any member against:

(a) The association;

(b) A member;

Amendment No. 5 (for drafter's use only)

(c) Any director or officer of an association who willfully and knowingly fails to comply with these provisions; and

(d) Any tenants, guests, or invitees occupying a parcel or using the common areas.

The prevailing party in any such litigation is entitled to recover reasonable attorney's fees and costs. A member prevailing in an action between the association and the member under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. This section does not deprive any person of any other available right or remedy.

========== T I T L E A M E N D M E N T ==========

Remove line(s) 41 and insert:

versions of that subsection; amending s. 720.305, F.S.; providing that, where a member is entitled to collect attorney's fees against the association, the member entitled to fees may not be assessed a pro rata share of such fees; amending s. 720.306, F.S.;

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 6 (for drafter's use only)

Bill No. **HB 0391**

6

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Adams offered the following:

Amendment (with directory and title amendments)

Between lines 450-451, insert:

Section 6. Subsection (5) is added to section 720.305, Florida Statues, to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights; failure to fill sufficient number of vacancies on board of directors to constitute a quorum; appointment of receiver upon petition of any member.--

(5) No association may sue to foreclose a lien against real property during any period of time that the member of the association who owes the money giving rise to the lien is also entitled to the homestead protection defined in art. X, s. 4(a)(1) as to that parcel of real property. This subsection does not prevent the filing of a lien against the real property, nor does this subsection bar the filing of an action against a subsequent purchaser of the real property regardless of whether the definition of homestead may be applicable to such subsequent

purchaser. Any applicable statute of limitations, whether applicable to an in rem foreclosure action or applicable to an in personam action against the member, shall be tolled during any period of time that the association is barred from filing or prosecuting a foreclosure action by this subsection.

========== T I T L E A M E N D M E N T ==========

Remove line(s) 41 and insert:

versions of that subsection; amending s. 720.305, F.S.; prohibiting an association from filing a foreclosure action against homestead property; providing exceptions; tolling applicable limitation periods; amending s. 720.306, F.S.;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 543 Condominiums
SPONSOR(S): Goodlette
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Business Regulation Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Ownership of a condominium unit is a unique real estate form of ownership. An owner is entitled to both the exclusive ownership and possession of a unit and an undivided interest as a tenant in common with the other unit owners in the common areas. In other words, a condominium is a single real-estate unit contained within a multi-unit condominium in which a person has both separate ownership of a unit and a common interest, along with the condominium's other owners, in the common areas.

Currently, in order to terminate a condominium, even after a catastrophic event, the consent of all the unit owners and all the holders of the recorded liens affecting any of the condo parcels is required. This bill amends the law regarding condominium termination to:

- Authorize the termination a condominium for economic waste or impossibility;
- Provide alternative methods for the allocation of proceeds from the sale of condominium property;
- Lower the total vote requirement for termination of a condominium depending on the circumstances; and
- Provide a method by which a court may entertain a petition to approve a plan of termination of a condominium.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill increases the probability that condominium unit owners will have increased flexibility in terminating the condominium for economic waste or impossibility.

B. EFFECT OF PROPOSED CHANGES:

Condominiums are creatures of statute, and are thereby subject to the control and regulation of the legislature, which has broad discretion in its regulatory efforts, especially in fashioning remedies necessary to protect the interests of those persons involved. "The condominium concept must operate within the applicable statutory and constitutional provisions."[1]

Basically, a condominium is a parcel of real estate that has been subdivided into contiguous lots. The area above the land can be "subdivided into a number of three-dimensional air spaces, each susceptible of being separately conveyed and incumbered."[2]

Condominium unit owners operate as a democracy, of necessity more restrictive in the use of condominium property than might be acceptable given traditional forms of property ownership. Thus, a condominium owner "relinquishes some degree of freedom of choice and agrees to subordinate some of his traditional ownership rights when he elects condominium ownership. While a titleholder of a condominium unit has fundamental property rights, he enjoys them coextensively with other members of the condominium project, and thus does not have an exclusive interest in the condominium property."[3]

A "declarant" is a grantor that establishes or joins in the creation of a declaration of condominium. A "unit" refers to the physical portion of a condominium designated for separate ownership or occupancy. An individual who purchases or owns an apartment in a condominium is generally referred to as a "unit owner."[4]

Current Law Regarding Termination

Chapter 718, F.S., the "Condominium Act," governs condominium associations. Section 718.117, F.S. provides the general rules and procedures relating to the termination of a condominium, and those provisions are set forth below.

Termination

In order to terminate a condominium, the consent of all the unit owners and all the holders of the recorded liens affecting any of the condo parcels is required.[5]

Vacancy on the Board

Unless provided otherwise, a vacancy in the board during a winding up proceeding, resulting from the resignation or expiration of term of any director, can be filled by a majority vote of the unit owners.[6]

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[1] 31 CJS § 193, Estates.
[2] *Id.*
[3] *Id.*
[4] 15a Am. Jur. 2d s. 1, Condo.
[5] See s. 718.117(1), F.S., unless the declaration provides otherwise.
[6] S. 718.117(3), F.S.

Natural Disaster

If, after a natural disaster, the identity of the directors or their right to hold office is in doubt, or if they are deceased or unable to act, or if they fail or refuse to act, or their whereabouts cannot be ascertained, any interested person may petition the circuit court to determine the identity of the directors, or, if determined to be in the best interest of the unit owners, to appoint a receiver to wind up the affairs of the association after hearing upon such notice to such persons as the court may direct.

The receiver will be vested with the powers of the board of directors, as provided in the declaration and bylaws and statute and such other powers that are necessary to wind up the affairs of the association. The order appointing the receiver will provide for the payment of a reasonable fee for the services of the receiver from the sources identified in the order, which may include rents, profits, incomes, maintenance fees, or special assessments collected from the condominium property.[7]

Terminated Association

An association that has been terminated continues to exist, however, for the limited purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, to dispose of and convey its property, and to collect and divide its assets"[8]

Distribution of Assets

After determining that all known debts and liabilities of an association in the process of winding up have been paid or provided for, all remaining assets must be distributed.[9] If the winding up is pursuant to a court proceeding, the distribution may not be made until after any prescribed period ordered by the court for the presentation of claims.[10]

Assets held by an association upon a valid condition requiring return which condition has occurred or will occur, need to be returned in accordance with the condition.[11] The remaining assets are to be distributed in the following manner: (1) if the declaration or bylaws provides the manner of disposition, the assets are to be disposed of in that manner; and (2) if the declaration or bylaws do not provide the manner of disposition, the assets are to be distributed among the unit in the same shares as each owner previously owned in the common elements.[12] All liens must be transferred to the share in the condominium property attributable to the unit originally encumbered by the lien in its same priority

The distribution of the assets can be made by money, property, or securities, and the distribution can be in installments or as a whole. But distribution must be made as soon as reasonably consistent with the beneficial liquidation of the assets.[13]

Effect of the Bill

The bill amends s. 718.117, F.S. regarding the method and process for termination of a condominium. Initially it should be noted, that s. 718.117(1), F.S. provides legislative findings that "it is contrary to the public policy of this state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation." This section, further, provides that it will apply to all condominiums in Florida in existence or after the effective date of this act.[14]

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[7] S. 718.117(4), F.S.
[8] S. 718.117(9), F.S.
[9] 10 Fla. Jur. 2d s. 43, Condominiums, Etc., (referencing s. 718.117(5), F.S.).
[10] S. 718.117(5), F.S.
[11] S. 718.117(6), F.S.
[12] S. 718.117(6)(a), (b), (7), F.S.
[13] 10 Fla. Jur. 2d s. 43, Condominiums, Etc. (citing s. 718.117(8), F.S.).
[14] S. 718.117(1), F.S.

Termination
Condominium

This bill provides, notwithstanding any contrary provision in the declaration, a condominium may be terminated by a plan of termination (hereinafter "plan of termination" or "plan") approved by either the lesser of a majority of the total voting interests or as otherwise provided in the declaration, in the following circumstances: (1) when the total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or (2) when it becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.[15]

Condominiums that are Timeshares

Notwithstanding the provisions above, a condominium in which 75% or more of the units are timeshare units may only be terminated by a plan of termination that is approved by 80% of the total voting interests of the association and the holders of 80% of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium (unless the declaration provides for a lower voting percentage).[16]

Optional Termination

Except as provided elsewhere in this bill[17] or unless the declaration provides for a lower percentage, a condominium may be terminated by a plan of termination approved by at least 80% of the total voting interests of the condominium.[18]

Jurisdiction of Court

If 80% of the total voting interests fail to approve a plan of termination but fewer than 20% of the total voting interests vote to disapprove a plan, the circuit court will have jurisdiction to entertain a petition by the association or by one or more unit owners and approve the plan of termination.[19] This action may be a class action.[20]

All unit owners and the association must be parties to the action, and the action may be brought against the nonconsenting unit owners. Service of process on unit owners may be by publication, but the plaintiff must furnish each unit owner not personally served with process a copy of the petition and plan of termination, and after entry of judgment, a copy of the final decree of the court, by mail at the owner's last known address.[21]

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[15] S. 718.117(2)(a), F.S.
[16] S. 718.117(2)(b), F.S.
[17] See ss. 718.117(2) and (4), F.S.
[18] S. 718.117(3), F.S. This portion does not apply to condominiums in which 75% or more of the units are timeshare units.
[19] S. 718.117(4)(a), F.S.
[20] *Id.*
[21] S. 718.117(4)(b), F.S.

Mortgage Leinholders

After the consideration of whether the rights and interests of unit owners are equitably addressed in the plan, the plan of termination may be approved or rejected by the court. The court may modify the plan to provide for an equitable distribution of the interests of unit owners prior to approving the plan.[22] [23]

Associations Powers of Termination

Approval of a plan by the holder of a recorded mortgage lien affecting a condominium parcel in which fewer than 75% of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien; notwithstanding any contrary provision in the declaration or ch. 718, F.S.[24]

The condominium association will continue in existence following approval of the plan, with all powers it had before. Notwithstanding any contrary provision, after approval of the plan, the board has essentially the same powers and duties currently provided for in s. 718.117(2).[25]

Natural Disaster

The bill provides a contingency framework, s. 718.117(8), F.S., for the directors of the association in the event of a natural disaster. That framework is essentially identical to the existing on provided in s. 718.117(4), F.S.

Plan of Termination

The plan must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee.[26] A copy of the proposed plan must be given to all unit owners in the same manner as for notice of an annual meeting. That notice must be provided at least 14 days prior to the meeting during which the plan is to be voted upon. Or notice must be provide prior to or simultaneously with the distribution of the solicitation seeking execution of the plan or written consent to or joinder in the plan.[27] A unit owner may agree to the plan by executing the plan or by consent to or joinder in the plan in the manner of a deed. A plan of termination and the consents or joinders of unit owners and, if required, consents or joinders of mortgagees must be recorded in the public records of each county in which any portion of the condominium is located. The plan is effective only upon recordation or at a later date specified in the plan.[28]

A plan must specify:[29]

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[22] S. 718.117(4)(c), F.S.
[23] Nevertheless, this subsection does not apply to condominiums in which 75% or more of the units are timeshare units, s. 718.117(4)(d), F.S.
[24] S. 718.117(6), F.S.
[25] S. 718.117(7), F.S. Those powers and duties include the ability to: employ directors, agents, attorneys, and other professionals to liquidate or conclude its affairs; conduct the affairs of the association as necessary for the liquidation or termination; carry out contracts and collect, pay, and settle debts and claims for and against the association; defend suits brought against the association; sue in the name of the association for all sums due or owed to the association or to recover any of its property; perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes; sell at public or private sale or to exchange, convey, or otherwise dispose of assets of the association for an amount deemed to be in the best interests of the association, and to execute bills of sale and deeds of conveyance in the name of the association; collect and receive rents, profits, accounts receivable, income, maintenance fees, special assessments, or insurance proceeds for the association; and contract and do anything in the name of the association which is proper or convenient to terminate the affairs of the association.
[26] S. 718.117(9), F.S.
[27] *Id.*
[28] *Id.*
[29] S. 718.117(10), F.S.

- The name, address, and powers of the termination trustee;
- A date after which the plan of termination is void if it has not been recorded;
- The interests of the respective unit owners in the association property, common surplus, and other assets of the association, which will be the same as the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided;
- The interests of the respective unit owners in any proceeds from any sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property). If, condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms; and
- Any interests of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction. Unless the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property).[30]

The plan may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.[31]

In the case of a conditional termination, the plan must specify the conditions for termination. A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded.[32]

Allocation of Proceeds of Sale of Condominium Property

Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination.[33] The market values are to be determined by one or more independent appraisers selected by the association or termination trustee.[34]

The portion of proceeds allocated to the units will be further apportioned among the individual units. The apportionment is deemed fair and reasonable if it is determined by any of the following methods: 1) the respective values of the units based on the fair-market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee; 2) the respective values of the units based on the most recent market value of the units before the termination, as provided in the county property appraiser's records; or 3) the respective interests of the units in the common elements specified in the declaration immediately before the termination.[35]
The three methods of apportionment listed above do not prohibit any other method of apportioning the proceeds of sale allocated to the units agreed upon in the plan of termination. However, the portion of

[30] *Id.*
[31] S. 718.117(11)(a), F.S.
[32] S. 718.117(11)(b), F.S.
[33] S. 718.117(12)(a), F.S.
[34] *Id.*
[35] S. 718.117(12)(b), F.S.

the proceeds from the common elements will be divided among the units based upon their respective interests in the common elements as provided in the declaration. [36]

Liens that encumber a unit are transferred to the proceeds of the sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property. [37]

Termination Trustee

The association will serve as termination trustee unless another person is appointed in the plan of termination. If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. Upon recording or at a later date specified in the plan, title to the condominium property vests in the trustee. Unless prohibited by the plan, the termination trustee will be vested with the powers given to the board. [38]

If the association does not serve as the termination trustee, the trustee's powers are coextensive with those of the association to the extent not prohibited in the plan or the order of appointment. If the association is not the termination trustee, the association will transfer any association property to the trustee. If the association is dissolved, the trustee will also have the powers necessary to conclude the affairs of the association. [39]

Title Vested in Termination Trustee

If termination is pursuant to a plan, the unit owners' rights and title as tenants in common in undivided interests in the condominium property vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property, but the contract is not binding on the unit owners until the plan is approved. [40]

Notice

Within 30 days after a plan has been recorded, the termination trustee must deliver by certified mail, return receipt requested, notice to all unit owners, lienors of the condominium property, and lienors of all units at their last known addresses that a plan has been recorded. The notice must include the book and page number of the public records in which the plan was recorded, notice that a copy of the plan must be furnished upon written request, and notice that the unit owner or lienor has the right to contest the fairness of the plan. [41]

Within 90 days after the effective date of the plan, the trustee must provide to the division[42] a certified copy of the recorded plan, the date the plan was recorded, and the county, book, and page number of the public records in which the plan was recorded. [43]

Right to Contest

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[36] S. 718.117(12)(c), F.S.
[37] S. 718.117(12)(d), F.S.
[38] S. 718.117(13), F.S.
[39] *Id.*
[40] S. 718.117(14), F.S.
[41] S. 718.117(15)(a), F.S.
[42] Division refers to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation. S. 718.103(17), F.S.
[43] S. 718.117(15)(b), F.S.

A unit owner or lienor may contest a plan by initiating a summary procedure, pursuant to s. 51.011, F.S., within 90 days after the date the plan is recorded. A unit owner or lienor who fails to contest the plan within that period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property. [44]

In an action contesting a plan, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. However, the apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in s. 718.117(12) (see the discussion above regarding the allocation of property).[45]

The court must adjudge the rights and interests of the parties and order the plan to be implemented if it is fair and reasonable, but the court must void a plan that is determined not to be fair and reasonable. In such an action, the prevailing party may recover reasonable attorney's fees and costs.[46]

Distribution

Following termination, the condominium property, association property, common surplus, and other assets of the association are held by the termination trustee, as trustee for unit owners and holders of liens on the units, in their order of priority. [47]

Not less than 30 days prior to the first distribution, the termination trustee must deliver by certified mail, return receipt requested, a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit at their last known addresses stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount.[48] The deadline must be at least 15 days after the date the notice was mailed.[49]

If a unit owner or lienor files a timely objection with the termination trustee, the trustee does not have to distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim.[50] In the alternative, the trustee may interplead the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs and court costs. [51]

The proceeds of any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets must be distributed in the following priority:[52]

1. To pay the costs of implementing the plan, including demolition, removal, and disposal fees, termination trustee's fees and costs, accounting fees and costs, and attorney's fees and costs;

2. To lienholders of liens recorded prior to the recording of the declaration;

3. To lienholders of liens of the association which have been consented to;[53]

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[44] S. 718.117(16), F.S.
[45] *Id.*
[46] *Id.*
[47] S. 718.117(17)(a), F.S.
[48] S. 718.117(17)(b), F.S.
[49] S. 718.117(17)(b), F.S.; the notice may be sent with or after the notice required by s. 718.117(15).
[50] S. 718.117(17)(b), F.S.
[51] *Id.*
[52] S. 718.117(17)(c), F.S.

4. To creditors of the association, as their interests appear;

5. To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor;

6. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor;

7. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor.

After determining that all known debts and liabilities of an association in the process of termination have been paid or adequately provided for, the termination trustee will distribute the remaining assets pursuant to the plan.[54] If the termination is by court proceeding, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed.[55]

Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, will be returned, transferred, or conveyed in accordance with the condition. The remaining association assets shall be distributed pursuant to the priority order above.[56]

Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets.[57]

Association Status

The termination of a condominium does not change the corporate status of the association that operated the condominium property. The association continues to exist to conclude its affairs, prosecute and defend actions by or against it, collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not to act except as necessary to conclude its affairs.[58]

Creation of Another Condominium

The termination of a condominium does not bar the creation, by the termination trustee, of another condominium affecting any portion of the same property.[59]

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[53] S. 718.121(1), F.S., requires the unanimous consent of the unit owners before a lien is valid against the condominium as a whole.
[54] S. 718.117(17)(d), F.S.
[55] *Id.*
[56] S. 718.117(17)(e), F.S.
[57] S. 718.117(17)(f), F.S.
[58] S. 718.117(18), F.S., this section is essentially s. 718.117(9), F.S.
[59] S. 718.117(19), F.S., is essentially s. 718.117(10), F.S.

Exclusion

This section does not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums under s. 718.110(7), F.S. [60]

C. SECTION DIRECTORY:

Section 1: Amends s. 718.117, F.S., to provide for termination of a condominium.

Section 2: Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill provides increased opportunity for condominium owners who are a part of an uneconomic condominium to terminate that condominium; thereby allowing for greater flexibility in the investment or reinvestment of capital.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

[60] S. 718.117(20), F.S., is essentially s. 718.117(11), F.S.

2. Other:

Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[61] "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[62] [63]

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[64] The *Pomponio* Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable in this state." *Pomponio*, 378 So. 2d at 780. When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.*

In other words, "[t]his method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." *U.S. Fidelity and Guaranty Co. v. Department of Insurance.*, 453 So. 2d 1355, 1360-61 (1984). What should be reviewed when considering this balancing test?

> [T]he United States Supreme Court recently outlined the main factors to be considered in applying this balancing test. The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.
> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

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[61] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "

[62] 10a Fla. Jur. s. 414, Constitutional Law.

[63] The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

[64] The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

U.S. Fidelity and Guaranty. Co., 453 So.2d at 1360-61 (Fla. 1984) (internal citations and quotations omitted).

The language of the proposed s. 718.117, specifically the requirement that "this section shall apply to all condominiums in this state in existence on or after the effective date of this act,"[65] would seem to qualify under the Florida Supreme Court's definition of impairment of contract.[66] Therefore, the critical inquiry would seem to be the balancing test performed by the courts to determine the permissibility of the impairment. While not an exhaustive list, this bill would seem to have at least two significant factors which would mitigate in its favor. First, all condominiums are created by statute and subject to the control of the legislature.[67] Second, the bill makes a legislative finding that the public policy of this state is driving the changes in this bill.[68]

On the other hand, the bill works an immediate and what could be termed a substantial change to contractual obligations. Further, this may not be the least restrictive means possible for dealing with the public policy announced in the bill.[69]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

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[65] S. 718.117(1), F.S.

[66] As the Fourth District Court of Appeal noted it is only the retroactive application of a statute "which gives rise to questions of unreasonable impairment of contract obligations and remedies." *Cenville Investors, Inc. v. Condominium Owners Org. of Century Village East, Inc.*, 556 So. 2d 1197, 1200 (Fla. 4th DCA 1990).

[67] S. 718.104, F.S. provides "[e]very condominium created in this state shall be created pursuant to this chapter." See *Winkelman v. Toll*, 661 So. 2d 102, 105 (Fla. 4th DCA 1995)(stating "[a] condominium is strictly a create of statute.").

[68] The Supreme Court of Florida referenced *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) which cited to *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) for the proposition that "laws intended to regulate existing contractual relationships must serve a legitimate public purpose . . . Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Pomponio*, 378 So. 2d at 778.

[69] See *Pomponio*, 378 So. 2d at 781-82, stating:

> We believe that the balance between the state's probable objectives and its method of implementation, in the one hand, and the degree of contract impairment inflicted in furtherance of its policy, on the other, favors preservation of the contract over this exercise of the police power. Bearing on our view is the fact that the manner in which the police power has been wielded here is not the least restrictive means possible.

A bill to be entitled

An act relating to condominiums; amending s. 718.117, F.S.; substantially revising provisions relating to the termination of the condominium form of ownership of a property; providing legislative findings; providing grounds; providing powers and duties of the board of administration of the association; waiving certain notice requirements following natural disasters; providing requirements for a plan of termination; providing for the allocation of proceeds from the sale of condominium property; providing powers and duties of a termination trustee; providing notice requirements; providing a procedure for contesting a plan of termination; providing rules for the distribution of property and sale proceeds; providing for the association's status following termination; allowing the creation of another condominium by the trustee; specifying an exclusion; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 718.117, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 718.117, F.S., for present text.)

718.117 Termination of condominium.--

(1) LEGISLATIVE FINDINGS.--The Legislature finds that it is contrary to the public policy of this state to require the

continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation. The provisions of this section shall apply to all condominiums in this state in existence on or after the effective date of this act.

(2) TERMINATION BECAUSE OF ECONOMIC WASTE OR IMPOSSIBILITY.--

(a) Notwithstanding any provision to the contrary in the declaration, the condominium form of ownership of a property may be terminated by a plan of termination approved by the lesser of a majority of the total voting interests or as otherwise provided in the declaration for approval of termination, in the following circumstances:

1. When the total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or

2. When it becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.

(b) Notwithstanding paragraph (a), a condominium in which 75 percent or more of the units are timeshare units may only be terminated pursuant to a plan of termination approved by 80 percent of the total voting interests of the association and the holders of 80 percent of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium, unless the declaration provides for a lower voting

percentage.

(3) OPTIONAL TERMINATION.--Except as provided in subsections (2) and (4) or unless the declaration provides for a lower percentage, the condominium form of ownership of the property may be terminated pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium. This subsection does not apply to condominiums in which 75 percent or more of the units are timeshare units.

(4) JURISDICTION.--

(a) If 80 percent of the total voting interests fail to approve the plan of termination but fewer than 20 percent of the total voting interests vote to disapprove of the plan, the circuit court shall have jurisdiction to entertain a petition by the association or by one or more unit owners and approve the plan of termination, and the action may be a class action.

(b) All unit owners and the association must be parties to the action. The action may be brought against the nonconsenting unit owners as a class action. Service of process on unit owners may be by publication, but the plaintiff must furnish each unit owner not personally served with process a copy of the petition and plan of termination, and after entry of judgment, a copy of the final decree of the court, by mail at the owner's last known address.

(c) After the consideration of whether the rights and interests of unit owners are equitably set forth in the plan of termination as required by this section, the plan of termination may be approved or rejected by the court. Consistent with the provisions of this section, the court may also modify the plan

of termination to provide for an equitable distribution of the interests of unit owners prior to approving the plan of termination.

(d) This subsection does not apply to condominiums in which 75 percent or more of the units are timeshare units.

(5) EXEMPTION.--A plan of termination is not an amendment subject to s. 718.110(4).

(6) MORTGAGE LIENHOLDERS.--Notwithstanding any provision to the contrary in the declaration or this chapter, approval of a plan of termination by the holder of a recorded mortgage lien affecting a condominium parcel in which fewer than 75 percent of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien affecting the parcel.

(7) POWERS IN CONNECTION WITH TERMINATION.--The association shall continue in existence following approval of the plan of termination, with all powers it had before approval of the plan. Notwithstanding any contrary provision in the declaration or bylaws, after approval of the plan, the board has the power and duty:

(a) To employ directors, agents, attorneys, and other professionals to liquidate or conclude its affairs.

(b) To conduct the affairs of the association as necessary for the liquidation or termination.

(c) To carry out contracts and collect, pay, and settle debts and claims for and against the association.

(d) To defend suits brought against the association.

(e) To sue in the name of the association for all sums due

or owed to the association or to recover any of its property.

(f) To perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes.

(g) To sell at public or private sale or to exchange, convey, or otherwise dispose of assets of the association for an amount deemed to be in the best interests of the association, and to execute bills of sale and deeds of conveyance in the name of the association.

(h) To collect and receive rents, profits, accounts receivable, income, maintenance fees, special assessments, or insurance proceeds for the association.

(i) To contract and do anything in the name of the association which is proper or convenient to terminate the affairs of the association.

(8) NATURAL DISASTERS.--

(a) If, after a natural disaster, the identity of the directors or their right to hold office is in doubt, if they are deceased or unable to act, if they fail or refuse to act, or if they cannot be located, any interested person may petition the circuit court to determine the identity of the directors or, if found to be in the best interests of the unit owners, to appoint a receiver to conclude the affairs of the association after a hearing following notice to such persons as the court directs.

(b) The receiver shall have all powers given to the board pursuant to the declaration, bylaws, and subsection (7), and any other powers that are necessary to conclude the affairs of the association and are set forth in the order of appointment. The

appointment of the receiver is subject to the bonding requirements of such order. The order shall also provide for the payment of a reasonable fee to the receiver from the sources identified in the order, which may include rents, profits, incomes, maintenance fees, or special assessments collected from the condominium property.

(9) PLAN OF TERMINATION.--The plan of termination must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee. A copy of the proposed plan of termination shall be given to all unit owners, in the same manner as for notice of an annual meeting, at least 14 days prior to the meeting at which the plan of termination is to be voted upon or prior to or simultaneously with the distribution of the solicitation seeking execution of the plan of termination or written consent to or joinder in the plan. A unit owner may document assent to the plan of termination by executing the plan or by consent to or joinder in the plan in the manner of a deed. A plan of termination and the consents or joinders of unit owners and, if required, consents or joinders of mortgagees must be recorded in the public records of each county in which any portion of the condominium is located. The plan of termination is effective only upon recordation or at a later date specified in the plan.

(10) PLAN OF TERMINATION; REQUIRED PROVISIONS.--The plan of termination must specify:

(a) The name, address, and powers of the termination trustee.

(b) A date after which the plan of termination is void if it has not been recorded.

(c) The interests of the respective unit owners in the association property, common surplus, and other assets of the association, which shall be the same as the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided in the declaration.

(d) The interests of the respective unit owners in any proceeds from any sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any of the methods prescribed in subsection (12). If, pursuant to the plan of termination, condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms.

(e) Any interests of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction. Unless the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any of the methods prescribed in subsection (12).

(11) PLAN OF TERMINATION; OPTIONAL PROVISIONS; CONDITIONAL TERMINATION.--

(a) The plan of termination may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.

(b) In the case of a conditional termination, the plan

must specify the conditions for termination. A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded.

(12) ALLOCATION OF PROCEEDS OF SALE OF CONDOMINIUM PROPERTY.--

(a) Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan of termination must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee.

(b) The portion of proceeds allocated to the units shall be further apportioned among the individual units. The apportionment is deemed fair and reasonable if it is determined by any of the following methods:

1. The respective values of the units based on the fair-market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee;

2. The respective values of the units based on the most recent market value of the units before the termination, as provided in the county property appraiser's records; or

3. The respective interests of the units in the common

elements specified in the declaration immediately before the termination.

(c) The methods of apportionment in paragraph (b) do not prohibit any other method of apportioning the proceeds of sale allocated to the units agreed upon in the plan of termination. The portion of the proceeds allocated to the common elements shall be apportioned among the units based upon their respective interests in the common elements as provided in the declaration.

(d) Liens that encumber a unit shall be transferred to the proceeds of sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property.

(13) TERMINATION TRUSTEE.--The association shall serve as termination trustee unless another person is appointed in the plan of termination. If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. Upon recording or at a later date specified in the plan, title to the condominium property vests in the trustee. Unless prohibited by the plan, the termination trustee shall be vested with the powers given to the board pursuant to the declaration, bylaws, and subsection (7). If the association is not the termination trustee, the trustee's powers shall be coextensive with those of the association to the extent not prohibited in the plan of termination or the order of appointment. If the association is not the termination trustee,

the association shall transfer any association property to the trustee. If the association is dissolved, the trustee shall also have such other powers necessary to conclude the affairs of the association.

(14) TITLE VESTED IN TERMINATION TRUSTEE.--If termination is pursuant to a plan of termination under subsection (2) or subsection (3), the unit owners' rights and title as tenants in common in undivided interests in the condominium property vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property, but the contract is not binding on the unit owners until the plan is approved pursuant to subsection (2) or subsection (3).

(15) NOTICE.--

(a) Within 30 days after a plan of termination has been recorded, the termination trustee shall deliver by certified mail, return receipt requested, notice to all unit owners, lienors of the condominium property, and lienors of all units at their last known addresses that a plan of termination has been recorded. The notice shall include the book and page number of the public records in which the plan was recorded, notice that a copy of the plan shall be furnished upon written request, and notice that the unit owner or lienor has the right to contest

the fairness of the plan.

(b) The trustee, within 90 days after the effective date of the plan, shall provide to the division a certified copy of the recorded plan, the date the plan was recorded, and the county, book, and page number of the public records in which the plan was recorded.

(16) RIGHT TO CONTEST.--A unit owner or lienor may contest a plan of termination by initiating a summary procedure pursuant to s. 51.011 within 90 days after the date the plan is recorded. A unit owner or lienor who does not contest the plan within such 90-day period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property. In an action contesting a plan of termination, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. The apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in subsection (12). The court shall adjudge the rights and interests of the parties and order the plan of termination to be implemented if it is fair and reasonable. The court shall void a plan that is determined not to be fair and reasonable. In such action, the prevailing party may recover reasonable attorney's fees and costs.

(17) DISTRIBUTION.--

(a) Following termination of the condominium, the condominium property, association property, common surplus, and other assets of the association shall be held by the termination

trustee, as trustee for unit owners and holders of liens on the units, in their order of priority.

(b) Not less than 30 days prior to the first distribution, the termination trustee shall deliver by certified mail, return receipt requested, a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit at their last known addresses stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount. The deadline must be at least 15 days after the date the notice was mailed. The notice may be sent with or after the notice required by subsection (15). If a unit owner or lienor files a timely objection with the termination trustee, the trustee does not have to distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim. In the alternative, the trustee may interplead the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs and court costs.

(c) The proceeds of any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets shall be

distributed in the following priority:

1. To pay the costs of implementing the plan of termination, including demolition, removal, and disposal fees, termination trustee's fees and costs, accounting fees and costs, and attorney's fees and costs.

2. To lienholders of liens recorded prior to the recording of the declaration.

3. To lienholders of liens of the association which have been consented to under s. 718.121(1).

4. To creditors of the association, as their interests appear.

5. To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor.

6. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor as provided in paragraph (b).

7. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor as provided in paragraph (b).

(d) After determining that all known debts and liabilities of an association in the process of termination have been paid

or adequately provided for, the termination trustee shall distribute the remaining assets pursuant to the plan of termination. If the termination is by court proceeding or subject to court supervision, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed.

(e) Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, shall be returned, transferred, or conveyed in accordance with the condition. The remaining association assets shall be distributed pursuant to paragraph (c).

(f) Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets.

(18) ASSOCIATION STATUS.--The termination of a condominium does not change the corporate status of the association that operated the condominium property. The association continues to exist to conclude its affairs, prosecute and defend actions by or against it, collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not to act except as necessary to conclude its affairs.

(19) CREATION OF ANOTHER CONDOMINIUM.--The termination of a condominium does not bar the creation, by the termination trustee, of another condominium affecting any portion of the same property.

(20) EXCLUSION.--This section does not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums under s. 718.110(7).

Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 543**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Goodlette offered the following:

Amendment

Insert at line 186 :

for repair or reconstruction at the time of termination. Unless the declaration expressly

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2 (for drafter's use only)

Bill No. **HB 543**

2

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Goodlette offered the following:

Amendment

Insert at line(s) 216 :

by the unit owners approving the plan of termination by any of the following methods: